(17)

No. 96-568-CFX
Status: GRANTED

Title: Joseph Oncale, Petitioner
v.
Sundowner Offshore Services, Incorporated, et al.

Docketed:
October 10, 1996

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Canaday III,Nicholas

Counsel for respondent: Reasoner,Harry M.

Entry	Date	Note	Proceedings and Orders
1	Oct 10 1996	G	Petition for writ of certiorari filed. (Response due November 9, 1996)
2	Nov 12 1996		Brief of respondents Sundowner Offshore Service, Incorporated, et al. in opposition filed.
3	Nov 26 1996		DISTRIBUTED. December 13, 1996 (Page 1)
4	Dec 16 1996	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
5	May 20 1997		REDISTRIBUTED. June 5, 1997 (Page 1)
6	May 20 1997		Brief amicus curiae of United States filed.
8	Jun 4 1997		Letter from the Solicitor General containing the decision in Fredette v. BVP Management Associates, received and distributed.
7	Jun 9 1997		Petition GRANTED. SET FOR ARGUMENT December 3, 1997. **********
9	Jun 26 1997	*	Record filed. Partial record proceedings United States Court of Appeals for the Fifth Circuit.
10	Jul 1 1997	*	Record filed. Original record proceedings United States District Court for the Eastern District of Louisiana.
12	Jul 15 1997		Order extending time to file brief of petitioner on the merits until August 11, 1997.
13	Aug 11 1997		Joint appendix filed.
14	Aug 11 1997		Brief of petitioner Joseph Oncale filed.
15	Aug 11 1997		Brief amici curiae of United States, et al. filed.
16	Aug 11 1997		Brief amicus curiae of Association of Trial Lawyers of America filed.
17	Aug 11 1997		Brief amicus curiae of National Employment Lawyers Association filed.
18	Aug 11 1997		Brief amici curiae of National Organization on Male Sexual Victimization, et al. filed.
19	Aug 11 1997		Brief amici curiae of Lambda Legal Defense and Education Fund, et al. filed.
20	Aug 11 1997		Brief amici curiae of Law Professors Kathryn Franke, et al. filed.
22	Sep 3 1997		Order extending time to file brief of respondent on the merits until October 14, 1997.
23	Oct 14 1997		Brief of respondents Sundowner Offshore Service, Inc., et al. filed.
24	Oct 14 1997		Brief amicus curiae of Equal Employment Advisory Council filed.

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No. 96-568-CFX

Entry	Date	Note	Proceedings and Orders
25	Oct 14 1997		Brief amicus curiae of Texas Association of Business etc. filed.
26	Oct 29 1997	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
29	Nov 6 1997		CIRCULATED.
27	Nov 17 1997		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
28	Nov 19 1997	X	Reply brief of petitioner Joseph Oncale filed.
30	Dec 3 1997		ARGUED.

Supreme Court, U.S.
FILED

96 568 OCT 10 1996

No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ONCALE,

Petitioner,

versus

SUNDOWNER OFFSHORE SERVICES, INCORPORATED; JOHN LYONS; DANNY PIPPEN; AND BRANDON JOHNSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

1. Whether same sex (Male on Male) sexual harassment claims are actionable under the Civil Rights Act, Section 703(a) of Title VII and 42 U.S.C. § 2000(e)-2(a)(1)?

2. Whether the Fifth Circuit has erred as a matter of law in holding that same-sex harassment claims are not cognizable under Title VII?

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PETITION FOR WRIT OF CERTIORARI

Joseph Oncale respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding May 20, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 83 F.3d 118 and is reproduced at Appendix A. The order of the United States Court of Appeals for the Fifth Circuit denying the suggestion for rehearing *en banc* is not reported and is reproduced at Appendix B. The Judgment of the United States District Court for Eastern District of Louisiana is reproduced at Appendix C. The opinion of the United States District Court for the Eastern District of Louisiana is reported at 67 Fair Emply. Prac. Cas. (BNA) 769 and is reproduced at Appendix D.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1996. Joseph Oncale's petition for rehearing and suggesting for rehearing *en banc* was denied on July 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 2000e-2 provides, in pertinent part:

(a) Employer Practices. It shall be an unlawful employment practice for an employer –

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. Procedural History

Through complaint for damages filed in the United States District Court, Eastern District of Louisiana, on May 5, 1994, Joseph L. Oncale advances a "same sex" sexual discrimination action against Sundowner Offshore Services, Inc., Oncale's payroll employer at the time of the alleged harassment, and three male co-workers, John Lyons, Danny Pippen and Brandon Johnson. Joseph Oncale alleges violations of Title VII of the Civil Rights Act, 42 U.S.C. Section 2000e-2(a)(1), and seeks remedies and relief as provided for under law. In response, the defendants filed a general denial and, ultimately, a summary judgment motion, challenging Joseph Oncale's right to advance a "male on male" sexual harassment claim under Title VII. The Employer's summary judgment motion was heard in the District Court on March 8, 1995.

Through Judgment entered March 24, 1995, the Honorable G. Thomas Porteous, Jr., United States District

Judge, granted summary judgment in favor of the defendants. Reasoning the Fifth Circuit, through *Garcia v. Elf Atochem North America*, 28 F.2d 446 (5th Cir. 1994), had "clearly articulated its position that same sex harassment does not state a claim under Title VII," the District Court found that Mr. Oncale, a male, could not, **as a matter of law**, advance a cause of action under Title VII for harassment by male co-workers. Further, the District Court observed that defendants Pippen and Johnson could not be considered Oncale's "employers" under Title VII. A timely appeal followed.

On May 20, 1996 the Fifth Circuit affirmed the trial court's summary judgment determination, holding that same-sex sexual harassment is not cognizable under Title VII. In response, Joseph Oncale requested rehearing and reconsideration of the matter *en banc*. This effort to obtain reconsideration of the Fifth Circuit's position that, as a matter of law, same-sex sexual harassment claims are not viable under Title VII, failed and this petition followed.

B. Background Facts

Mr. Oncale's claim arises out of a series of events that occurred during his employment as a roustabout assigned to an off-shore drilling location with Sundowner Offshore Services between August and November of 1991.[1] Joseph Oncale was denied his civil and employment rights in violation of law as over a number of weeks

[1] Oncale was hired through Sundowner's Houma Louisiana office and worked "seven on, seven off" on Chevron USA's Ship Shoal 266-A platform. During his shift, Mr. Oncale worked on Platform A and stayed in the crew's quarters located

he was sexually assaulted, battered, touched, and threatened with homosexual rape by his direct supervisor, John Lyons, and a second supervisor, Danny Pippen, who, as a driller for Sundowner, exercised *de facto* control over the terms and conditions of Oncale's employment. The third individual defendant, Brandon Johnson, a co-worker with no apparent supervisory authority, assisted John Lyons in one of the attacks.[2]

Mr. Oncale, who suffered several direct, sexual assaults and innumerable threats of continuing sexual

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on Platform B. At all relevant times Oncale's crew consisted of John Lyons, crane operator, Danny Pippen, driller, Brandon Johnson, roughneck, a derrick hand and two other roustabouts.

[2] The facts testified to by Joseph Oncale, which must be accepted as true for purposes of Sundowner's summary Judgment motion and this appeal, are that on October 25, 1991 Danny Pippen grabbed and held Oncale as the crew was being transported by boat from Platform A to Platform B. John Lyons then removed his penis from his pants and placed it on the back of Oncale's head. As Oncale struggled to free himself Lyons said he was going to "fuck (Oncale) in the behind." The sexual harassment continued.

The next morning, as the crew was being lifted unto Platform A in a personnel basket Brandon Johnson grabbed and restrained Oncale to facilitate another sexual assault by Lyons. During this attack Lyons again removed his penis from his pants, this time placing it on Oncale's arm and again assuring Oncale that he would have to submit to these sexual advances.

The sexual assaults continued as the crew returned to their quarters on October 26, 1991. As Oncale was taking a shower, Pippens and Lyons got into the shower stall with Oncale. Pippens pinned Oncale as Lyons inserted a bar of soap into "the cheeks of his (Oncale's) behind." As they held Oncale both men, Pippens and Lyons, assured Oncale that they were going to "fuck (Oncale) in the behind."

abuse and who twice reported the situation to his employer's highest ranking representative on the job site, to no avail, was forced to quit his employment as he feared that were he to stay he "would be raped or forced to have sex."[3] The facts of the vulgar and violent actions of the individual defendants and the circumstances under which Joseph Oncale reported the sexual harassment to his toolpusher and safety director were fully submitted to the Trial Court in response to the summary judgment motion. The summary judgment record also includes the admission by Brandon Johnson that he restrained Joseph Oncale while John Lyons said he was going to put his dick on Oncale.

The background facts, thus, are that Oncale's immediate supervisor, John Lyons, and another supervisor, Danny Pippen, who had *de facto* control over the conditions of his employment, physically restrained him on two occasion while John Lyons placed his penis on Mr. Oncale's arm. The supervisors further violated Oncale sexually on a third occasion when John Lyons attacked Mr. Oncale in the showers and forced a bar of soap into Mr. Oncale's anus while Danny Pippen held Mr. Oncale. The supervisors attacked Joseph Oncale both in the designated work areas of the rig while Mr. Oncale was on duty and in the showers/living quarters, repeatedly assuring Oncale that they desired and intended sexual intercourse and that they would continue with their assaults as long as Mr. Oncale remained employed on the Sundowner rig.

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[3] After each of the sexual attacks Oncale reported the events to Valent Hohen, Jr., Safety Compliance Clerk for Sundowner. Hohen refused to take any action.

The Safety Director and Toolpusher, the highest ranking employees of Sundowner on the rig were fully informed of the sexual assaults and harassment but did nothing to halt the repeated sexual threats and sexual battery. Instead, Mr. Lyons assured Joseph Oncale that his reporting of the sexual harassment would not bring an end to the ordeal, forcing Oncale to quit his employment. On November 10, 1991 Sundowner's Safety Compliance Officer signed a Separation Notice which identifies the reason for leaving as: "Voluntary Leaving due to sexual harassment and verbal abuse."

Joseph Oncale was not a lone or isolated victim of the sexual assaults committed by John Lyons. If this matter is allowed to proceed to trial Oncale's evidence will include the testimony of other victims of John Lyons and, further, Mr. Johnson's description of how, several weeks prior to the assaults on Joseph Oncale, John Lyons, again with the assistance of the other individual defendants, held down a worker by the name of Kent Brumfield and "sucked a hickey on his neck."

The deposition testimony of Danny Pippen is that the actions complained of by Joseph Oncale did occur and did not constitute "horseplay" within the community of offshore laborers. Further, Danny Pippen admits that as a driller he had authority to direct and terminate Mr. Oncale's employment.

REASONS FOR GRANTING THE PETITION

Discrimination "because of sex," as it has evolved through the administrative process and adoption of the

"reasonable person" standard, is more than gender-driven denial of specific employment opportunities. It is, and includes, conduct of an employer or supervisory personnel for which the employer is responsible which implicitly or explicitly communicates that an individual's right to continued employment is conditioned upon submission to unwelcomed sexual advances. When an individual of either gender reasonably perceives that he must abandon his employment to escape unsolicited sexual harassment and verbal and physical sexual assault, he is the victim of employment discrimination based on sex as proscribed by Title VII. Lyons', Johnson's and Pippen's act of selecting Joseph Oncale to be the victim of their unsolicited sexual harassment and assaults was an act of discrimination "because of sex" as Joseph Oncale, alone among the males in the work place, was forced to tolerate his direct supervisors' deviant approaches as a condition of his employment. As a matter of law and fact Oncale has advanced a viable hostile environment and quid pro quo sexual discrimination claim. To the extent the decision below and the Fifth Circuit's decision in *Garcia v. Elf Atochem North America, supra*, act as a bar to this Title VII action they are inconsistent with the language, scope and purpose of applicable law as defined by the United States Supreme Court and must be set aside. This Court should grant Joseph Oncale's petition, overturn the Fifth Circuit's absolute rejection of "same sex" actions under Title VII and allow Joseph Oncale to proceed with his claims.

1. The Fifth Circuit's flat declaration that same sex harassment is never actionable under Title VII has been questioned by other Courts of Appeals. A conflict of interpretation exists among the Circuits.

The Fifth Circuit's flat pronouncement that same-sex sexual harassment is not cognizable under Title VII has divided the courts and commentators of this land.[4] Other Circuits have indicated that same-sex claims should not be excluded from the scope of Title VII and the bar of discrimination based upon sex. See, for example, *Baskerville v. Culligan International Company*, 50 F.3d 428, 430 (7th Cir. 1995) (In a heterosexual harassment action, the Court noted parenthetically that "sexual harassment of women by men is the most common kind, but we do not need to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not be actionable in appropriate cases.") Similarly, *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 148 (2nd Cir. 1993) (Judge Van Graafeiland concurring) ("harassment is harassment regardless of whether it is caused by a member of the same or opposite sex.") *Cert. denied*, ___ U.S. ___, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994). The District of Columbia Circuit has also acknowledged

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[4] See, *Oncale v. Sundowner*, 83 F.2d 118 at notes 2 & 3 for citation to numerous district court decisions in which the *Garcia* approach was rejected. Consider further that computer generated research dated September 20, 1996 revealed more than 143 reported cases involving discussion of the Fifth Circuit's approach to "same sex" harassment disputes. One can state with accuracy that "male-male" harassment claims have triggered a variety of responses by, and disagreement among, the Federal Courts of this country.

the possibility of actionable sexual harassment under Title VII where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender." See *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

In *Hopkins v. Baltimore Gas and Electric Company*, 77 F.3d 745 (4th Cir. 1996) the Fourth Circuit considered Title VII claims brought by a male who complained that his male supervisor's comments and actions created a sexually hostile work environment in violation of Title VII of the Civil Rights Act of 1964. The trial court, with reference to the Fifth Circuit's *Garcia* decision, granted summary judgment for the employer, reasoning that an employee cannot state a Title VII claim of sexual harassment by a supervisor or co-worker of the same gender, *Hopkins v. Baltimore Gas and Electric* Company, 871 F. Supp. 822 (D. Md. 1994). A divided Fourth Circuit affirmed the trial court as a matter of fact, finding Mr. Hopkins had failed to make out a prima facie case, but through the lead opinion refused to embrace *Garcia* and the precept that same-gender harassment is never actionable under Title VII. *Hopkins*, 77 F.3d 750-753.

The uncertainties and divisions developing in the "same sex" Title VII arena are reflected plainly through the conflict among panels of the Court of Appeals for the Fourth Circuit. The lead opinion in *Hopkins* is inconsistent with another ruling out of the Fourth Circuit. In *M-Williams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir. 1996) a panel of the Fourth Circuit held that harassment among heterosexuals of the same sex could not, as a matter of law, give rise to a hostile environment sexual harassment claim under Title VII.

While the Fourth Circuit has split on the same sex harassment question, the Eighth Circuit has rejected the Fifth Circuit's approach.

In *Quick v. Donaldson Company, Inc.*, 1996 WL 420381 (8th Cir.) (Iowa) (July 29, 1996), the United States Court of Appeals for the Eighth Circuit considered a hostile environment sexual harassment claim based upon allegations the plaintiff, a male, was physically and verbally harassed by male co-workers and that his employer, Donaldson Company, Inc., knew of the harassment but failed to respond with proper remedial action. As in this case, the trial court granted summary judgment to the employer. The Eighth Circuit, reviewing the facts and finding genuine factual disputes precluded summary dismissal, reversed and remanded.

The important background facts were that Phil Quick, a male, was employed as a welder and press operator in his employer's muffler production facility. About 85% of the plant employees were male. Quick claimed he was the work-place victim of "bagging," (defined as the intentional grabbing and squeezing of another man's groin), as well as other physical assaults and verbal harassment. Like Joseph Oncale, Quick demonstrated that his complaints of sexual harassment were ignored by supervisory personnel. As the sexual harassment grew intolerable and obtaining no relief through complaints to his employer, Quick filed a charge of discrimination with the Iowa Civil Rights Commission. Eventually, he amended his complaint to add counts of sexual discrimination in violation of Title VII, 42 U.S.C. Section 2000e-2(a)(1).

Recognizing Quick's right to proceed under Title VII, the Eighth Circuit traced the interpretation and application of Title VII through *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) and *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). With reference to this authority the Eighth Circuit reasoned protection under Title VII is not limited to women but, instead, extends to all employees and prohibits disparate treatment of an individual, man or woman, based on that person's sex. There was no requirement, the Eighth Circuit continued, that Quick advance evidence of an "anti-male" or predominantly female work environment. Evidence that Quick, a male, was the primary target of sexual harassment was sufficient to show that the conduct was gender-based for purposes of summary judgment.

The Eighth Circuit quickly noted that four of the five elements of a "traditional" hostile environment claim were present: (1) Quick belonged to a protected group – he was male; (2) he was subject to unwelcomed sexual harassment; (3) harassment affected a term, condition, or privilege of employment; and (4) Quick's employer knew or should have known of the harassment and failed to take proper remedial action. Focusing on the fifth requirement, that the harassment be "based on sex," the Court found genuine issues of material fact existed, precluding summary judgment. The District Court noted the conduct was of a "genuine sexual nature" and, thus, could constitute sexual harassment. Further, the Eighth Circuit reasoned, the motive underlying the conduct, be it hooliganism or hatred, could not remove the defendants from the scope of Title VII. Whether the defendants'

actions constituted prohibited sexual harassment was a question to be tried.

In short, there are two conflicting judicial interpretations regarding same-gender sexual harassment. One interpretation is that, by its nature and as a matter of law, same-gender sexual harassment is not "based on sex" and is not actionable under Title VII. See, *Garcia v. Elf Atochem*, 28 F.3d 446, 451 (5th Cir. 1994); *Hopkins v. Baltimore Gas & Electric Co.*, 871 F. Supp. 822, 834-35 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir. Mar. 5, 1996). See, *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

The other interpretation, however, looks at the facts of each of harassment situation to determine whether the same-gender sexual harassment was based on sex. See, *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993); *Joyner v. AAA Copper Transp.*, 597 F. Supp. 537 (N.D. Ala. 1983), *aff'd without opinion*, 749 F.2d 732 (11th Cir. 1984); *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981). If the harasser was a homosexual, or acted homosexually, then the harassment of the heterosexual victim was based on sex and is actionable under Title VII.

As Judge Nagle noted in his dissent in *Quick v. Donaldson Company, Inc.*, 71 Fair Empl. Prac. Cas. (BNA) 551, 1996 WL 420381 (8th Cir.) (Iowa) July 29, 1996, the fundamental difference between the two schools of thought lies in the question who should decide whether a cause of action exists under Title VII given a "male-on-male" or "same sex" fact pattern. The *Garcia/Oncale* Fifth Circuit approach is to characterize the question as one of statutory interpretation with the Court having answering

the question in the negative: Title VII does not, as a matter of law, protect an employee from sexual harassment by a supervisor of the same gender. The other approach, adopted by the United States Court of Appeals for the Eighth Circuit in *Quick v. Donaldson Company, Inc., supra*, and suggested by the Seventh Circuit in *Baskerville* and the Second Circuit in *Saulpaugh* is to acknowledge the question as one of fact, allowing the fact finder, be it judge or jury, to decide the case through application of factors developed through decision of "traditional" hostile work environment and quid pro quo sexual harassment cases. It appears, therefore, that had Joseph Oncale, like Mr. Quick, brought his action in the Eighth Circuit or in the Second or Seventh Circuits his Title VII claims would have survived summary judgment review.

This Court should grant certiorari to address and resolve the uncertainty and inconsistency reflected in the lower courts' decision of "same sex" Title VII actions.

2. The Fifth Circuit's Categorical Rejection of "Same Sex" Harassment Claims Is Inconsistent With the Language, Intent and Scope of Title VII as Defined by This Court.

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals . . . sex." 42 U.S.C. Section 2000e-2(a)(1). The statute proscribes various forms of sexual harassment in the workplace, including both hostile or abusive environment claims as well as cases in which sexual misconduct is directly linked to the

grant or denial of an economic quid pro quo. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

In *Meritor Savings Bank v. Vinson*, this Court recognized for the first time that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment." Following the lead of several Circuit Courts of Appeals, the Supreme Court further held that "unwelcome sexual advances that create an offensive or hostile working environment" may form the basis of a claim of sex discrimination under Title VII. *Meritor Savings Bank, supra* at 64; accord *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). For sexual harassment to be actionable, the Court reasoned it "must be sufficiently severe or pervasive to alter the conditions of (the victims) employment and create a hostile or abusive work environment." *Vinson*, 477 U.S. at 67. *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1992).

While *Vinson* did not address "same sex" or "male-on-male" harassment, nothing in the Court's analysis of remedies suggests that Title VII is limited to heterosexual harassment. To the contrary, as this Court's definition of Title VII's scope is cast in gender neutral terms it appears the proper focus is the nature and severity of the sexual harassment and not the gender of the harasser and victim.[5] See, generally, *Sardinia v. Dellwood Foods, Inc.*, 1995 WL 640502 (S.D.N.Y. 1995).

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[5] "No matter what the gender of the harasser or victim, the 'gravamen of any sexual harassment claim is that the alleged

The language of Title VII provides no support for the Fifth Circuit's absolute rejection of Title VII same sex claims. Congress chose to use the unmodified word "sex" when referring to discrimination that is forbidden. This is a choice of an obviously gender neutral term, just as Congress chose to prohibit discrimination based on "race" rather than discrimination against African Americans or other specific minorities. Had Congress intended to prevent only heterosexual sexual harassment, it could have used the term "member of the opposite sex." Accordingly, the plain language of 42 U.S.C. Section 2000e-2 does not limit Title VII to heterosexual harassment and provides no statutory foundation for the Fifth Circuit's flat pronouncement that same sex harassment is never actionable under Title VII. As many courts have recognized, the language and purpose of Title VII is broad enough to include homosexual harassment claims. Sexual harassment of a subordinate by a supervisor of the same sex is an adverse employment action that the subordinate would not have faced but for his or her sex. See, for example, *Joyner v. AAA Copper Transportation*, 597 F. Supp. 357; *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981).

The plain meaning of the phrase in Title VII prohibiting discrimination based upon sex implies that it is unlawful to discriminate against women because they are women and men because they are men. When a supervisor makes offensive, homosexual sexual advances to a

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sexual advances were 'unwelcomed' ". *Meritor*, 47 U.S. at 68, citing 29 C.F.R. Section 1604.11(a) *Sardinia v. Dellwood Foods, Inc., supra.*

subordinate of the same sex, that supervisor communicates to the subordinate that submission to sexual advances has then become a pre-requisite or term or condition of continued employment. That supervisor is communicating to his subordinate that the subordinate must tolerate sexual assault, sexual battery and homosexual rape as a condition of his choice to exercise his right to continued employment. This is same sexual harassment and is actionable under Title VII.

While virtually no legislative history is available to guide the interpretation and application of Title VII's prohibition against discrimination based on sex[6] and Congress provided no hint in the statute as to what it meant by the term "sex" and did not address the issue of sexual harassment, the Fifth Circuit was not writing on a blank page in the *Garcia* and *Oncale* cases. Indeed, the scope of protection against discrimination on the basis of sex has been thoroughly considered and commented upon by the Equal Employment Opportunity Commission. The Fifth Circuit either ignores or rejects the EEOC's guidelines, one cannot determine which, when it declares

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[6] Opponents of Title VII added the proscription against sex discrimination when it was on the floor of the House of Representatives as a last minute attempt to prevent Title VII from passing. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-64 (1986). ("The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment.")

same sex sexual harassment is not cognizable under Title VII.

In 1980 the Equal Employment Opportunity Commission issued guidelines which define sexual harassment as discrimination based on sex within the meaning of Title VII. See, 29 C.F.R. Section 1604.11(a) (1993). More specifically, the EEOC defines sexual harassment as follows:

> "Unwelcomed sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

As evidenced through this Court's opinions in *Meritor Savings Bank v. Vinson, supra*, and *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42, 97 S.Ct. 401, 410 (1976), the guidelines issued by the EEOC, while not controlling do, by reason of their authority, constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance. Considering Joseph Oncale's claims in light of the EEOC's interpretive guidelines it is apparent he has stated a viable Title VII claim as submission to unwelcomed sexual advances became a condition for his continued employment with

Sundowner Offshore. The actions of his supervisors certainly created a sexually intimidating and offensive work environment in violation of law.[7]

In short summary, an interpretation of Title VII which permits same sex harassment claims is certainly required by this Court's embrace of the EEOC guidelines and its statement in *Meritor v. Vinson*, 477 U.S. at 64, 106 S.Ct. at 2404 (1986) that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex." The Fifth Circuit's flat rejection of Joseph Oncale's "same sex" Title VII action, founded as it is upon one District Court's unreasoned and unsupported assertion that male-on-male sexual harassment "was not the type of conduct Congress intended to sanction when it enacted Title VII," *Goluszek*, 697 F. Supp. at 1456, cannot be reconciled with the *Meritor* Court's approach to sexual harassment claims under Title VII.

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[7] The EEOC Guidelines on Discrimination Because of Sex – Sexual Harassment, 29 C.F.R. § 1604.11(a) (1993), clearly state, "[h]arassment on the basis of sex is a violation of Section 703 of Title VII." Moreover, following from the principle that Title VII prohibits sex discrimination against both genders, it is well settled that both men and women can be sexual harassers as well as victims of sexual harassment. See EEOC Compl. Man. (CCH) § 615.2(b)(1) (1981) (instructing that "[a] man as well as a woman may be the victim of sexual harassment," and that "a woman as well as a man may be the harasser"). See also EEOC Decision No. 81-16, Empl. Prac. Dec. (CCH) (1981) ¶ 6756 at 4796-97 (allegation that male supervisor "made unwanted sexual advances" toward male subordinate states "a violation of Title VII" if substantiated).

Next, the *Garcia/Oncale* approach to interpretation of Title VII and definition of discrimination "based on sex" is inconsistent with the gender-neutral approach embraced within the Eleventh Circuit's decision in *Henson v. Dundee*, 682 F.2d 897, 902 (1992) and cited approvingly in both the lead opinion in *Meritor* and Justice Scalia's concurring opinion in *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

Specifically, the High Court in *Meritor*, 477 U.S. at 66-67, 106 S.Ct. at 2405 (1986) cited with approval the Eleventh Circuit's statement in *Henson v. Dundee*, 682 F.2d 897, 902 (1992):

> "Surely, a requirement that **a man or a woman** run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." (Emphasis added)

Thus the language, scope and purpose of Title VII, it would appear, require the conclusion that men, as well as women, can be victims of discrimination based on sex proscribed under Title VII and the "gauntlet of sexual abuse" which a worker need not tolerate as a condition of employment includes homosexual sexual abuse.

Neither a man nor a woman can be required, as Joseph Oncale was required, to run a gauntlet of sexual abuse, as a condition of employment. To subject an individual to a sexually offensive and degrading environment as the price of walking in the door to go to work is to discriminate against that individual on the basis of sex. To require Joseph Oncale to endure the onslaught of sexually charged words and actions as a condition of his

employment with Sundowner is to subject him to harassment based on sex.

That the "evil" addressed through Title VII is more than gender-based denial of specific economic opportunities for women, as the Fifth Circuit declares through its embrace of *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) and its summary dismissal of Joseph Oncale's claims is reflected plainly in the broad discussion of the parameters of sexual discrimination engaged in by this Court in *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

In *Harris* this Court was called upon to define a discriminatorily "abusive work environment." Its approach to this matter is instructive for present purposes as this Court plainly defined the scope of Title VII of the Civil Rights Act of 1964 in gender-neutral terms. As the Court stated in its explanation of an actionable hostile work environment claim, "Title VII bars conduct that would seriously affect *a reasonable person's* psychological well-being." *Harris*, 114 S.Ct. at 370-371, 126 L.Ed.2d at 302 (1993) (emphasis added). Where the environment would be reasonably perceived, and is perceived, as hostile or abusive, the "individual," "reasonable person" or "victim", be he male or female, is entitled to pursue the remedies afforded through Title VII. *Harris, supra.*

The Eleventh Circuit's approach to sexual discrimination claims and, particularly, its decision in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) was again noted by this Court. See, *Harris*, 114 S.Ct. at 370, 126 L.Ed.2d 295, 301 (1993).

In *Ellison*, 924 F.2d 878, 879 (9th Cir. 1991) the court reviewed a hostile environment sexual harassment action brought by a female employee of the Internal Revenue Service and held:

> " . . . a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."

Then, in an important footnote which foreshadowed the "reasonable person" standard adopted in *Harris*, the Eleventh Circuit stated:

> "Of course, where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man." *Ellison*, 924 F.2d at 879, n.11.

Given this language and the United States Supreme Court's adoption of a "reasonable person" approach to analysis of sexual harassment claims, it must be determined that Joseph Oncale, having advanced allegations of sexual harassment – defined by the EEOC as "unwelcomed sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature See, 29 C.F.R. Section 1604.11(a) (1995) – which the reasonable man could consider sufficiently severe to alter the conditions of his employment and create an abusive work environment, is entitled to proceed. Title VII addresses more than the denial of specific economic opportunities, there is no textual or historical support for the Fifth Circuit's interpretation of the statute and men

are "individuals" under the law entitled to the protections afforded through Title VII.

Lastly, there is no logical foundation for the Fifth Circuit's absolute rejection of same sex Title VII claims. No Court has ever explicitly interpreted Title VII as requiring a plaintiff to prove that the person doing the discrimination is not of the same gender. Furthermore, application of the Fifth Circuit's rule would be illogical because it is obvious that sexual harassment by a supervisor of the same sex is exaction of a condition of employment which, but for his or her sex, an employee would not have faced.

The absurd circumstances which continued application of the *Oncale* rule would create are underscored by the U.S. District Court for the Eastern District of Louisiana in the matter of *Pritchett v. Sizeler Real Estate Management Company*, No. Civ. A. 93-2351, 1995 WL 241855 (E.D. La. April 25, 1995). In *Pritchett*, the plaintiff filed an action against her former employer alleging that she was sexually harassed by her female supervisor in violation of Title VII. Dismissing the defense motion for summary judgment, the Court reasoned it seemed discriminatory that a supervisor should be exempted from a Title VII sexual harassment claim solely because of that supervisor's sexual origination or the gender of his victim. As the Court in *Pritchett* put it, "to conclude that same-gender harassment is not actionable under Title VII is to exempt homosexuals from the very laws governing the work place conduct of heterosexuals." *Pritchett v. Sizeler Real Estate Management Company*, No. Civ. A. 93-2351, 1995 WL 241855 (E.D. La. April 25, 1995). In effect, the Fifth Circuit's rejection of same-sex Title VII claims gives

homosexual harassers, or harassers who chose to act homosexually, license to harass. Certainly, the clear language, broad scope and defined purpose of Title VII, as articulated by this Court, are violated by the Fifth Circuit's chosen interpretation.

CONCLUSION

Congress prohibited discrimination based upon sex. This means that if a person receives discriminatory treatment from a company or a supervisor because of the employee's sex, Title VII has been violated. When a male supervisor propositions or harasses a male subordinate and conditions the subordinate's continued employment upon submission to the sexual whim of the supervisor the subordinate has been discriminated against "based on sex." The Court should hold that the violent and vulgar sexual harassment endured by Joseph Oncale is actionable under Title VII. John Lyons, Danny Pippen and Brandon Johnson, with the acquiescence of their superiors, required sexual favors and submission to sexual assault as a precondition to Mr. Oncale's continued employment. The treatment Joseph Oncale received certainly constitutes sexual discrimination as defined by the EEOC and this Court.

For the reasons stated, the Court should grant the petition for writ of certiorari.

Respectfully submitted

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APPENDIX A

Joseph ONCALE, Plaintiff-Appellant,

v.

SUNDOWNER OFFSHORE SERVICES, INC., John Lyons, Danny Pippen, and Brandon Johnson, Defendants-Appellees.

No. 95-30510.

United States Court of Appeals,
Fifth Circuit.

May 20, 1996.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before SMITH, DUHÉ, and DeMOSS, Circuit Judges.

DUHÉ, Circuit Judge:

Appellant Joseph Oncale filed this suit against Sundowner Offshore Services, Inc., ("Sundowner"), John Lyons, Danny Pippen and Brandon Johnson, alleging that he had been sexually harassed during his employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The district court granted summary judgment in favor of the defendants and dismissed Oncale's case. Because our decision in *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir.1994), holds that same-sex harassment is not cognizable under Title VII, we affirm.

BACKGROUND

Joseph Oncale was employed by Sundowner on an offshore rig from August to November 1991. Oncale filed this Title VII action against Sundowner, John Lyons, his Sundowner supervisor, and Danny Pippen and Brandon Johnson, two Sundowner co-workers, alleging sexual harassment. Oncale alleges that the harassment included Pippen and Johnson restraining him while Lyons placed his penis on Oncale's neck, on one occasion, and on Oncale's arm, on another occasion; threats of homosexual rape by Lyons and Pippen; and the use of force by Lyons to push a bar of soap into Oncale's anus while Pippen restrained Oncale as he was showering on Sundowner premises. Oncale alleges both *quid pro quo* and hostile work environment sexual harassment.[1] Oncale quit his job at Sundowner soon after the shower incident.

The district court granted summary judgment on Oncale's Title VII claim, relying upon our statement in *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir.1994), that harassment by a male supervisor against a male subordinate does not state a claim under Title VII. Thus, the court concluded that it was "compelled to find that Mr. Oncale, a male, has no cause of action under Title

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[1] Sexual harassment in the workplace violates Title VII if it constitutes *quid pro quo* harassment, i.e., a supervisor conditions job benefits either explicitly or implicitly on an employees participation in sexual activity, *see Jones v. Flagship Int'l*, 793 F.2d 714, 721-22 (5th Cir.1986), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987), or if it alters an employee's working conditions by creating a hostile work environment because of the employee's sex. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993).

VII for harassment by male co-workers." Finally, the court found that Oncale's co-workers, Pippen and Johnson, could not be held liable as "employers" under Title VII.

DISCUSSION

Precedential Value of Garcia

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. § 2000e-2(a)(1). Appellant and the Equal Employment Opportunity Commission (as *Amicus Curiae*) argue that Title VII's prohibition against sex discrimination and the Supreme Court's sexual harassment decisions are formulated in gender-neutral terms, and therefore, prohibit all discrimination *because of sex*, whether it is discrimination against men or women. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (referring to "victims" of sexual harassment, and not just female victims, and adopting "reasonable person" standard for measuring offensiveness of work environment); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986) (" 'Surely a requirement that a *man or woman* run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.' ") (emphasis added) (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir.1992)). Under this reading of the statute, so long as the plaintiff proves that

the harassment is because of the victim's sex, the sex of the harasser and victim is irrelevant.

This panel, however, cannot review the merits of Appellant's Title VII argument on a clean slate. We are bound by our decision in *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir.1994), and must therefore affirm the district court. Although our analysis in *Garcia* has been rejected by various district courts,[2] we cannot overrule a prior panel's decision. In this Circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the Court *en banc* or the Supreme Court. *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir.1991).

This Circuit's same-sex Title VII jurisprudence began with *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir.1993) (per curiam) (unpublished), *cert. denied*, ___ U.S. ___, 115 S.Ct. 311, 130 L.Ed.2d 274 (1994). Although the holding in that case is not entirely clear, it appears that the Court

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[2] These cases include *Williams v. District of Columbia*, 916 F.Supp. 1, 8 (D.D.C.1996); *Sardinia v. Dellwood Foods, Inc.*, 1995 WL 640502, at *4-5 (S.D.N.Y. Nov. 1, 1995); *King v. M.R. Brown, Inc.*, 911 F.Supp. 161, 167 (E.D.Pa.1995); *Ecklund v. Fuisz Technology, Ltd.*, 905 F.Supp. 335, 338 (E.D.Va.1995); *Raney v. District of Columbia*, 892 F.Supp. 283, 286 (D.D.C.1995); *Griffith v. Keystone Steel & Wire*, 887 F.Supp. 1133, 1136 (C.D.Ill.1995); *E.E.O.C. v. Walden Book Co., Inc.*, 885 F.Supp. 1100, 1101 (M.D.Tenn.1995); *Roe v. K-Mart Corp.*, 1995 WL 316783, at *1 (D.S.C. March 28, 1995); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F.Supp. 1545, 1550 (M.D.Ala.1995); *McCoy v. Johnson Controls World Services, Inc.*, 878 F.Supp. 229, 231 (S.D.Ga.1995).

ruled that male-on-male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex. Next, in *Garcia*, we extended *Giddens* to bar all same-sex sexual harassment claims:

> Finally, we held in *Giddens v. Shell Oil Co.*, No. 92-8533 [12 F.3d 208] (5th Cir. Dec. 6, 1993) (unpublished), that '[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.' *Accord Goluszek v. Smith*, 697 F.Supp. 1452, 1456 (N.D.Ill.1988). Thus, what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.

This discussion seems to indicate clearly that same-sex harassment claims are not viable under Title VII. When read in its proper context, however, this final paragraph of the *Garcia* opinion poses an interpretive problem. Because the Court had already found an independent basis to affirm the grant of summary judgment to each defendant, no part of this analysis is necessary to support the ultimate decision. Thus, the question arises whether we should treat *Garcia's* pronouncement on same-sex sexual harassment as binding precedent or dictum. When faced with this issue, some district courts in this Circuit (like the trial court here) have applied *Garcia* to dismiss same-sex harassment claims. *See Sarff v. Continental Express*, 894 F.Supp. 1076, 1082 (S.D.Tex.1995); *Myers v. City of El Paso*, 874 F.Supp. 1546, 1548

(W.D.Tex.1995). Others, by contrast, have ruled that *Garcia's* statements about same-sex harassment are dicta. *See Pritchett v. Sizeler Real Estate Mgmt. Co.*, 1995 WL 241855, at *2 (E.D.La. April 25, 1995); *Castellano v. Whole Foods Market, Inc.*, No. H-94-2673, slip op. at 7-8 (S.D.Tex. October 26, 1995).

We read *Garcia's* analysis of sexual harassment as binding precedent. After stating that Title VII does not recognize male-on-male claims, the Court explicitly stated that summary judgment "was proper on this basis also." This language suggests that the same-sex rationale for rejecting Garcia's claim is an alternative holding, which we treat as *stare decisis* in this Circuit. "It has long been settled that all alternative rationales for a given result have precedential value. 'It does not make a reason given for a conclusion *obiter dictum*, because it is the only one of two reasons for the same conclusion.' " *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 925 n. 21 (5th Cir.1977) (quoting *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340, 48 S.Ct. 194, 196, 72 L.Ed. 303 (1928)). Moreover, another panel of this Court has recognized *Garcia* as binding precedent on the issue of same-sex harassment, thereby resolving any uncertainty about *Garcia's* precedential force. *See Blake v. City of Laredo*, 58 F.3d 637 (5th Cir.1995) (per curiam) (unpublished). Therefore, *Garcia* remains the law of this Circuit.[3]

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[3] Although no circuit split yet exists, other circuits have indicated that same-sex claims should not be excluded from Title VII's purview. *See, e.g., Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir.1995) (In a heterosexual harassment action, the court noted parenthetically that "[s]exual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not be actionable in appropriate cases."). Similarly, in concurring with the Second Circuit's decision in *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994), Judge Van Graafeiland observed, "harassment is harassment regardless of whether it is caused by a member of the same or opposite sex." The District of Columbia Circuit has also acknowledged the possibility of actionable sexual harassment under Title VII where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender." *Barnes v. Costle*, 561 F.2d 983, 990 n. 55 (D.C.Cir.1977).

The Fourth Circuit, by contrast, recently held that harassment among *heterosexuals* of the same sex cannot give rise to a hostile environment sexual harassment claim under Title VII. *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir.1996). *McWilliams*, however, explicitly does not "purport to reach any form of same-sex discrimination claim where either victim or oppressor, or both, are homosexual or bisexual." *Id.* at 1195 n. 4. In a later decision, the Fourth Circuit in dicta expressed its disagreement with the reasoning of *Garcia*. *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 751 (4th Cir.1996).

CONCLUSION

For the foregoing reasons, the decision of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30510

JOSEPH ONCALE,

Plaintiff-Appellant,

versus

SUNDOWNER OFFSHORE SERVICES INCORPORATED; JOHN LYONS; DANNY PIPPEN; BRANDON JOHNSON;

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 5/20/96, 5 Cir., ___, ___ F.3d ___)

(July 12, 1996)

Before SMITH, DUHÉ, AND DeMOSS, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested

that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhé, Jr.
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE

VERSUS

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON

JUDGMENT

(Filed March 24, 1995)

The Court having granted the motion for summary judgment of defendants Sundowner Offshore Services, Inc., John Lyons, Danny Pippen, and Brandon Johnson;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants Sundowner Offshore Services, Inc., John Lyons, Danny Pippen, and Brandon Johnson, and against plaintiff, Joseph Oncale, dismissing plaintiff's claims with prejudice.

New Orleans, Louisiana this 23nd day of March, 1995.

/s/ G Thomas Porteous
G. Thomas Porteous, Jr.
United States District Judge

APPENDIX D

MINUTE ENTRY
PORTEOUS, J.
MARCH 23, 1995

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	CIVIL ACTION
VERSUS	NO. 94-1483
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON	SECTION "T" (Filed March 24, 1995)

Before the Court is Defendants' Motion for Summary Judgment. Plaintiff, Joseph Oncale, has filed opposition. This motion came before the Court for hearing on March 8, 1995.

Background

Plaintiff was employed as a roustabout by Sundowner Offshore Services, Inc. ("Sundowner") for several weeks in November of 1991. Plaintiff filed this suit for damages against Sundowner and three male individuals employed by Sundowner, John Lyons ("Lyons"), Danny Pippen ("Pippen") and Brandon Johnson ("Johnson"), alleging violations of the Civil Rights Act, Section 703(a)(1) of Title VII, and 42 U.S.C. 2000(e)-2(a)(1). Specifically, plaintiff seeks reinstatement to his former position or to a similar position, or in the alternative, damages resulting from the alleged sexual discrimination and

harassment he experienced while employed by Sundowner.

Standard for Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The Fifth Circuit has explained that "[t]he Supreme Court has defined material facts as those that will affect the outcome of the lawsuit under governing law." *Meyers v. M/V Eugenio C.*, 919 F.2d 1070, 1072 (5th Cir. 1990), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Plaintiff's Complaint Does Not Give Rise to a Title VII Violation

Plaintiff's complaint alleges specific physical acts and verbal assaults perpetrated against plaintiff by Lyons, Pippen and Johnson. These acts and assaults, if proven, would constitute outrageous conduct by the defendants which would be actionable under Louisiana law.[1] However, plaintiff's complaint in this matter only alleges violations of Title VII, and the Fifth Circuit has clearly articulated its position that same sex harassment does not state a claim under Title VII. *See Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994).

The issue presented to the Fifth Circuit in *Garcia* was whether the district court erred in granting summary

[1] The Court is suggesting that plaintiff could have timely brought a state action.

judgment in favor of the defendants[2], dismissing Garcia's claim that he had been sexually harassed by a male coworker during his employment, in violation of Title VII. Affirming the grant of summary judgment, the Fifth Circuit explained that Garcia was limited to seeking equitable relief because the provisions of the Civil Rights Act of 1991 providing for damages were not retroactively effective as to his claim.[3] However, the Court continued its analysis, ruling that:

> Garcia's Title VII claim was also properly dismissed because he did not establish a prima facie case against any of the defendants.

Id. at 450. The Court explained that "Title VII prohibits an 'employer' from discriminating 'against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.' " *Id.* Section 2000e(b) defines an employer as "a person engaged in an industry affecting commerce . . . and any agent of such a person. . . . In this Circuit, we have accorded the phrase 'any agent' a liberal construction. . . . ". *Id.* at 451. The "liberal construction" has been extended to include immediate supervisors who participate in the decision-making process that forms the basis

[2] Named as defendants in the *Garcia* suit were the parent company of Garcia's employer, the plant manager, and the plant foreman.

[3] Because no further incidents of harassment occurred after Garcia complained to his supervisors, and because Garcia continued in his employment with Seagraves Oazark, equitable relief was inappropriate, and damages were unavailable.

of the discrimination. However, "[t]here can be no liability under Title VII . . . 'for the actions of mere co-workers.' " *Id.* (citation omitted).

Although the *Garcia* court found an independent basis to affirm the grant of summary judgment as to each defendant, it concluded as follows:

> II. Sexual Harassment
>
> Finally, we held in *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished), that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Accord Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). Thus, what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.

Id. at 451-52. Plaintiff argues that the above quoted language is dicta, however the Court disagrees. Although the *Garcia* court articulated other grounds to support its affirmance of summary judgment, it included the above quoted language and explicitly stated that summary judgment "was proper on this basis also." Following the clear directive of the Fifth Circuit in *Garcia*, this Court is compelled to find that Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers.

In addition, the Court finds that defendants Pippen and Johnson cannot be considered plaintiff's employer under Title VII, further supporting the Court's ruling granting summary judgment. *See* Affidavit of Edward M.

DuBroc, attached to defendant's motion for summary judgment.[4]

Accordingly, finding that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, defendant's motion for summary judgment is hereby *granted*.

/s/ G Thomas Porteous
G Thomas Porteous, Jr.
United States District Judge

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[4] Mr. DuBroc, the personnel director for Sundowner Services, Inc., states in his affidavit that plaintiff's direct supervisor on the rig would have been Lyons. Pippen, a driller, was the direct supervisor of derrick hands and floor hands, not of roustabouts. Johnson was a floor hand, and his supervisor was Pippen.

Supreme Court, U.S.
FILED
NOV 12 1996
CLERK

No. 96-568

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ONCALE,

Petitioner,

v.

SUNDOWNER OFFSHORE SERVICE, INCORPORATED; JOHN LYONS; DANNY PIPPEN; AND BRANDON JOHNSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress prohibited same-gender harassment when it enacted Title VII of the Civil Rights Act of 1964.

2. Whether an employee may assert a Title VII sexual harassment claim against his employer without proving that one gender was selected for disparate treatment.

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BRIEF IN OPPOSITION

Respondents file this Brief in Opposition and request that the Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Procedural History. This is an appeal from a final order granting summary judgment in favor of Respondents. Petitioner, Joseph Oncale ("Oncale"), filed this one-count action against his employer, Sundowner, his male supervisor, John Lyons, and two male co-workers, Danny Pippen and Brandon Johnson, alleging sexual harassment under Title VII of the Civil Rights Act of 1964. Respondents moved for summary judgment. The district court granted summary judgment for Respondents, holding that same-gender harassment was not actionable under Title VII and that Oncale's co-workers could not be held liable as employers under Title VII. Oncale appealed the judgment to the Fifth Circuit, which affirmed in a published opinion. *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3310 (U.S. Oct. 10, 1996) (No. 96-568).

Fact Statement. For three months in 1991, Oncale worked as a roustabout on Sundowner's offshore rig in the Gulf of Mexico. No females worked on the rig. Lyons was the crane operator, and therefore was Oncale's supervisor. Pippin and Johnson also worked on the rig but had no supervisory authority over Oncale.

During his employment on the rig, Oncale claims to have been sexually harassed.[1] He bases his claim on three specific events. First, Oncale alleges Lyons placed his penis on Oncale's arm and the back of his head while Pippin and Johnson restrained him. Second, Oncale alleges Pippin lifted Oncale in the shower to allow Lyons to rub a bar of soap "between the cheeks of [Oncale's] behind." Finally, Oncale alleges Lyons and Pippin threatened to have sex with Oncale while the prior two incidents occurred. These incidents occurred on October 25, 1991. Oncale quit fourteen days later.

Correction of Misstatements in the Petition. In his Petition for Writ of Certiorari, Oncale makes misstatements of fact which should be called to the Court's attention. Such misstatements of fact include:

1. Oncale states that Pippen had *de facto* control over him. This is not true. The district court specifically found that Pippen and Johnson were not Oncale's employer under Title VII. *See* Petition, Appendix D at 14-15 & n.4. The Fifth Circuit did not address this issue in its opinion.

2. Oncale attempts to sensationalize the facts by stating that John Lyons "forced a bar of soap into Mr. Oncale's anus. . . . " *Petition* at 5. The record does not support this statement. Oncale described the event differently in his deposition testimony and in his sworn statement given on December 5, 1991. (R. at 44, 125). Both statements recounted that Lyon "rubbed it between the cheeks" of Oncale's buttocks.

[1] Respondents vehemently deny that any harassment took place. Nevertheless, because this case was resolved by summary judgment, all well-pleaded allegations will be treated as true.

REASONS FOR DENYING THE WRIT

This appeal does not involve a determination of whether the alleged sexual harassment was appropriate – if true, the conduct would be reprehensible and Louisiana law would find it actionable. That is beyond dispute. The question presented by this case, however, is whether Title VII of the Civil Rights Act of 1964 does so as well.

I. The Fifth Circuit correctly held that Oncale did not have a Title VII claim.

No rationalization justifies ignoring both the language and the historical purpose of an unambiguous statute. Yet, that is precisely what Oncale asks this Court to do. Through Title VII, Congress prohibited discrimination against an individual based on certain enumerated characteristics – race, color, religion, sex or national origin. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988). These enumerated prohibitions were designed to eliminate certain historical bases of prejudice from the work place so as to ensure an "equal employment opportunity." *Connecticut v. Teal*, 457 U.S. 440, 448 (1982). Providing an equal employment opportunity for historically disadvantaged groups, however, does not require a blanket prohibition against all forms of work place harassment. *See Ashworth v. Roundup Co.*, 897 F. Supp. 489, 491 (W.D. Wash. 1995). Likewise, the fact that

the harassment has sexual overtones does not automatically make it discrimination on the basis of sex. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).

Oncale's argument confuses sexual harassment and gender discrimination. Congress has never passed a law specifically outlawing sexual harassment. *Plakio v. Congregational Home, Inc.*, 902 F. Supp. 1383, 1392 (D. Kan. 1995). "Sexual harassment is illegal because and only because it is a form of gender discrimination under Title VII." *Id.* (citation omitted). Although it is true that one can be the victim of gender discrimination without being a victim of sexual harassment, the reverse is not true: "One cannot be the victim of actionable sexual harassment if one is not a victim of gender discrimination." *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1181 (N.D. Ind. 1995). Without gender discrimination, "there can be no actionable sexual harassment." *Id.* And gender discrimination occurs only when the victim can prove that discrimination would not have occurred but for the victim's gender.

Despite Oncale's assertion that same-gender harassment is sex discrimination, the statutory language of Title VII, its legislative history, and the policy behind the statute indicate otherwise. If the Court extends Title VII liability to include same-gender harassment, the decision would affect far more than just Oncale. To hold that Title VII encompasses same-gender conduct would take the judiciary out of the traditional role of interpreting and reviewing a statute and into the role of legislating. *See Ulane*, 742 F.2d at 1086; *Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745, 755 (4th Cir.) (Wilkinson, J., concurring in part), *cert. denied*, 117 S.Ct. 70 (1996). Congress has

spoken through the language it chose. Because Title VII addresses gender discrimination only, a male's harassment by a supervisor of the same gender cannot state a claim despite sexual connotations. Unless a plaintiff alleges facts that would indicate that he was the harassed because he was male, he does not state a claim under Title VII.

Congress enacted Title VII for a limited purpose. It meant to combat the injustice caused by class-discrimination – that is, discrimination against women for no reason other than their gender. Despite any temptation to award Oncale a remedy based on abstract notions of justice, the protections of Title VII should not be extended beyond its plain language and congressional intent. *See Price Waterhouse v. Hopkins*, 490 U.S. 288, 295 (1989) ("[a]ttempts to evade tough decisions by erecting novel theories of liability are misguided."). To extend protection to Oncale's claim – where a male employee claims to have been sexually harassed by his male supervisors in an all-male environment – not only trivializes Title VII's important purpose, but it also ignores Title VII's limited scope. Federal law cannot solve all problems that may occur in the work place and it was never meant to. The Fifth Circuit's ruling was correct.

A. Title VII does not expressly prohibit same-gender harassment.

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> It shall be an unlawful employment practice for an employee . . . to fail or refuse to hire or to

> discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

42 U.S.C. § 2000e. In the context of Title VII's prohibition against discrimination, sex means "membership in a class delineated by gender." *DeCintio v. Westchester County Medical Ctr.*, 807 F.2d 304, 306 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987). "[B]ecause of . . . sex" means that "it is unlawful to discriminate against women because they are women and against men because they are men." *Ulane*, 742 F.2d at 1085.

Oncale attempts to shift the focus by placing undue emphasis on this Court's choice of words in two recent cases allowing sexual harassment claims. *See Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370 (1993) (referring to "victims" of sexual harassment and applying a "reasonable person" standard); *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (referring to discrimination "because of a subordinate's sex"). Oncale claims the language in *Harris* and *Vinson* is purposefully "gender neutral" and this somehow overcomes the absence of specific language in Title VII authorizing same-gender harassment claims. This argument, however, ignores the fact that both *Harris* and *Vinson* dealt with sexual harassment claims involving members of opposite sexes. There was no need for the Court to address the same-gender harassment issue and nothing should be read into the language that was not justified by the facts of those cases. *Harris* and *Vinson* did not address the same-gender harassment

issue simply because the question was not before the Court in either case. Gender neutral language merely allows for a male or a female to initiate harassment under Title VII. Gender neutral language in traditional sexual harassment cases cannot be used as a substitute for congressional authorization of same-gender harassment in Title VII.

The words of Title VII are expressly limited to certain enumerated categories of prohibited conduct in the work place. And "federal courts must accept Title VII in the same version as passed, no matter how grudging the acceptance. . . . " *Torres v. National Precision Blanking*, No. 96-C-776, 1996 WL 587556, at * 7 (N.D. Ill. Oct. 7, 1996). "[B]ecause of . . . sex" in Title VII means because of gender. Even language in *Harris*, though arguably couched in gender neutral terms, shows that Title VII would not prohibit same-gender harassment. In fact, Justice Ginsburg, in her concurrence, regarded "[t]he critical issue, Title VII's text indicates, [as] whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the *other sex* are not exposed." *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring) (emphasis added).

Although discrimination "because of . . . sex" has been interpreted to include sexual harassment, Title VII's fundamental purpose, as evidenced by the express language, was to remedy historical injustices certain groups faced in the work place. Even though same-gender discrimination can be a form of "sexual harassment," the simple truth is that such discrimination is beyond the reach of Title VII. Going beyond the statute's parameters

amounts to judicial legislation – providing a right Congress did not choose to establish in the language of Title VII. Since Congress did not prohibit same-gender harassment, summary judgment was proper.

B. No legislative history suggests that Congress intended to address same-gender harassment.

Title VII was enacted to rectify the injustice by class-based discrimination – namely, discrimination against African-Americans for no reason other than their race. This country's history of discrimination against African-Americans was well documented and was most evident in the work place. 110 Cong. Rec. 6548 (daily ed. Mar. 30, 1964). Congress enacted Title VII in an attempt to overcome this prejudice. 110 Cong. Rec. 6549 (daily ed. Mar. 30, 1964) (statement of Sen. Humphrey). Congress wanted to eliminate all vestiges of historical discrimination and it viewed Title VII as a way of accomplishing that laudable goal. *Id.*

Unlike provisions prohibiting discrimination based on race, color, religion, and national origin which were included in the bill from the outset and were hotly debated, the prohibition against sex discrimination received little legislative attention. Robert S. Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880 (1967) ("The heated debate [of the Civil Rights Act] on the House floor lasted nearly two weeks, but 'sex' discrimination was not considered until the day before the passage of the Act."). In fact, the legislative history shows that the House amendment adding the word "sex" to Title VII was an eleventh hour attempt to defeat the entire Civil Rights Act of 1964.

Ulane, 742 F.2d at 1085 (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977), *see also* 110 Cong. Rec. 2577 (daily ed. Mar. 30, 1964) (statement of Rep. Smith).

Congress was not concerned about the evils of same-gender harassment at the time it enacted the Civil Rights Act of 1964. The scant legislative discussion about sex discrimination in 1964 focused on discrimination against women. Robert S. Miller, Jr., 51 MINN. L. REV. at 880. This "traditional concept of sex" was all that concerned Congress in 1964. *Ulane*, 742 F.2d at 1084. Title VII's prohibition against sex discrimination "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women.' " *Vinson*, 477 U.S. at 64 (quoting *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). It does not, as Oncale suggests, evince any congressional intent to address same-gender harassment.

The legislative history has no indication that Congress provided a cause of action for an employee who claims to have been the victim of sexual harassment by a supervisor or co-worker of the same gender. Oncale argues that silence on this point is enough. It is clearly not. Title VII was enacted to eliminate all vestiges of class-based discrimination. Without clear legislative intent to the contrary, that protection should not be extended. The Fifth Circuit properly restricted the application of Title VII to those situations where the legislative history indicates that Congress intended it would apply.

C. This Court should not create a new cause of action because same-gender harassment is inherently different from harassment "because of . . . sex."

By definition, discrimination occurs when someone is harmed or denied a benefit solely because that person is a member of a group that the discriminator despises. Ellen Frankel Paul, *Sexual Harassment As Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 352 (1990). A same-gender harassment claim cannot constitute discrimination "because of . . . sex" since

> what the harasser is really doing is preferring or selecting some one member of his [own] gender for sexual attention, however unwelcome that attention may be to its object. He certainly does not despise the entire group, nor does he wish to harm its members, since he is a member himself and finds others of the group sexually attractive.

Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 n.1 (D. Wyo. 1993) (*citing* Ellen Frankel Paul, 8 YALE L. & POL'Y REV. at 351-52). Same-gender harassers do not despise members of their own gender. *Id.* Same-gender harassers are motivated, not by animus, but by libido. *See King v. Board of Regents of Univ. of Wis. System*, 898 F.2d 533, 539 (7th Cir. 1990). Harassment "based on sexual desire is not based on gender," and therefore, is not actionable. *Id.*

D. This Court should not create a cause of action for same-gender harassment because state law already protects employees, like Oncale, who claim to have been harassed by supervisors of the same gender.

If the alleged facts are true, they would be actionable under Louisiana law.[2] Instead of availing himself of the numerous causes of action under Louisiana law, Oncale chose to file a one-count complaint under Title VII. The conscious decision to forego state law causes of action cannot be confused with a lack of available remedies.

Louisiana law offered many options to Oncale. Article 2315 of the Louisiana Civil Code provides a cause of action for all intentional torts. Based on the allegations in the Complaint, Oncale may have asserted a state law tort claim against Lyons, Pippin, and Johnson for any intentional tort, including assault and battery, false imprisonment, or intentional infliction of emotional distress. Oncale may have asserted a state law tort claim against Sundowner for assault and battery. *See Emoakemeh v. Southern Univ.*, 654 So.2d 474, 477 (La. App. 1995) (holding university accountable for sexual battery by resident assistant under a vicarious liability theory). Article 2315 of the Louisiana Civil Code provides a cause of action for all negligent torts. Oncale may have asserted a negligent

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[2] Louisiana state law would apply because the permanent offshore rig was in Louisiana's territorial waters. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 99 (1971) (applying Louisiana statute of limitations to claim arising in Gulf of Mexico); *see also* Outer Continental Shelf Land Act, 43 U.S.C. § 1333(a)(1) (1988).

retention or supervision claim against his employer if he could prove Sundowner knew or should have known of the alleged harassers' propensity to engage in sexual harassment and failed to address the conduct. Additionally, Article 1031 of the Louisiana Workers' Compensation Act provides a cause of action to workers for certain on-the-job injuries. Apart from civil remedies, if the allegations were true, the State of Louisiana could have prosecuted Lyons, Pippin, and Johnson for attempted rape, attempted sodomy, or sexual assault and battery.

State law, not Title VII, should be used to address claims for same-gender harassment in the work place. There is no reason to expand the scope of coverage to include a cause of action for same-gender harassment when the States already address those concerns.

II. Even if this Court were inclined to recognize a cause of action for same-gender discrimination, Oncale is not the appropriate case to make that pronouncement.

Even assuming that same-gender discrimination is actionable under Title VII, Oncale must establish that the alleged discrimination was on the basis of Oncale's gender. *See Meritor Savs. Bank*, 477 U.S. at 66-67. Specifically, Oncale must demonstrate that he was the object of the alleged sexual overtures because he was male. A showing that the harassment complained of occurred "because of" his sex is an indispensable element in a case of this type. *Swentek v. USAIR, Inc.*, 830 F.2d 552, 558-59 (4th Cir. 1987); *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982). Thus, to have withstood summary judgment, Oncale was required to have introduced sufficient evidence from which a jury could have reasonably found that "but for his being male, he would not have been treated by his co-workers in the manner that he was." *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 138 (S.D. Tex. 1993).

Oncale has not made this threshold showing. Here, the record offers no basis to find that Lyons, Pippin and Johnson chose Oncale because of his gender or treated men and women differently on the basis of their gender. Oncale worked in an all male environment. It is impossible to determine how Lyons, Pippin and Johnson would have treated similarly situated women because no women worked on the rig. Oncale fails to show that "there existed a causal connection between the gender of the individual or class and the resultant preference or disparity," *DeCintio*, 807 F.2d at 307. For these reasons, his Title VII claim must fail.

A. Oncale worked in an all-male environment so he could not prove gender-based discrimination.

A sexually hostile, abusive, or oppressive workplace does not necessarily implicate Title VII. *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1175 (D. Nev. 1995). The purpose of Title VII is to provide individuals with "an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Savs. Bank*, 477 U.S. at 65. This Court has distinguished a merely abusive or hostile environment from one that is "discriminatorily" abusive or hostile. *See*

Harris, 114 S. Ct. at 370 (referring throughout to a "discriminatorily" abusive or hostile environment). Although the alleged behavior in this case may be considered reprehensible if true, it is not actionable under Title VII because the conduct is not gender discrimination.

Oncale cannot, as a matter of law, prove that he was selected for harassment because of his sex. He cannot show that, "but for his being male, he would not have been treated by his co-workers in the manner that he was." *Polly*, 825 F. Supp. at 137. Oncale cannot meet this "but for" requirement because he worked in an all-male environment. He has not and cannot allege facts which would support the notion that Sundowner, Lyons, Pippin and Johnson allowed and maintained a work environment that treats males as inferior, in contrast to the way it treats females. No females worked on the offshore platform. Sundowner, Lyons, Pippin and Johnson could not create nor foster anti-male sentiment in the workplace. Therefore, Oncale cannot show that he was singled out for different treatment on the basis of his sex. "If the nature of an employee's environment, however unpleasant, is not due to . . . gender, [he] has not been the victim of sex discrimination as a result of that environment." *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 538 (10th Cir. 1994).

To avoid this problem, Oncale suggests that the sexual orientation of Lyons, Pippin and Johnson should be open to litigation. Oncale makes this argument because the few employees who have prevailed in same-gender sexual harassment claims have done so by alleging and

proving that the supervisor was homosexual. *See, e.g., Wrightson v. Pizza Hut of America, Inc.*, No. 96-1127, 1996 WL 628257 (4th Cir. Oct. 31, 1996). Even the Fourth Circuit did not make sexual orientation an issue because in *Wrightson*, that issue was uncontested – the harassers were admitted homosexuals. 1996 WL 628257 at *1. Yet, even if this Court chooses to regard sexual orientation as something a fact-finder should determine, no evidence suggests that Lyons, Pippin or Johnson are homosexual. Plaintiff admitted to an EEOC investigator that he does not know or believe that Lyons, Pippin or Johnson are homosexuals. *See* (R. at 97). Oncale also admitted that Lyons and Pippin are married to women. (R. at 97). Oncale offered no summary judgment evidence to refute either of his prior statements.

Oncale argues, in effect, that because the underlying acts were directed to members of the same gender, that fact, and that fact alone, gives rise to an inference that Respondents are homosexual. If this line of inquiry is allowed, future cases of this type will turn on the question of the sexual orientation of the alleged perpetrator. Federal courts, however, should not be in the business of determining a person's sexual orientation. Under Oncale's argument, a plaintiff could go to the jury any time he alleged that the harasser was homosexual. If the harasser is not homosexual, there could be no recovery. If the harasser is bi-sexual, there could be no recovery. How are the courts to determine whether a person is homosexual when that issue is contested? Will the EEOC propose a uniform set of guidelines to assist the courts in resolving this inquiry? Such a notion is certainly inconsistent

with the language and purpose of Title VII, which is to address class-based discrimination.

If this Court were to adopt Oncale's position, disparate treatment would no longer be an element of a sexual harassment claim. It could not be under Oncale's argument because no women worked on the offshore rig. This Court should reject such an absurd notion. Disparate treatment is what Title VII is all about. As this Court recognized, the critical inquiry in any sexual harassment claim is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring). Oncale has neither alleged nor proven that similarly situated women were treated differently. The Fifth Circuit properly rejected his claim.

B. The alleged harassment, if it were gender-based, did not create an anti-male environment.

Even if Oncale is able to prove he was harassed because he is male, he fails to state a Title VII claim because the alleged harassment did not create an anti-male environment, a necessary factor for Title VII recovery. *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). The purpose of anti-discrimination law is to provide equal opportunities for both men and women. *Id.*

Creation of an anti-male or an anti-female environment is essential to any Title VII claim.

> A claim for a sexually hostile working environment is not a trivial matter. Its purpose is to level the playing field for women who work by preventing others from impairing their ability to compete on an equal basis with men. One must always bear that purpose in mind.

DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir. 1995).

It is impossible to level the playing field in this case. There is not a gender-biased work environment resulting from the oppressive acts of a dominant gender – it is a one gender environment. *See Johnson v. Hondo, Inc.*, No. 95-C-866, 1996 WL 531937, *7 (E.D. Wis. Sept. 9, 1996). Because Oncale cannot show the creation of an anti-male environment, his claim must necessarily fail.

CONCLUSION

For these reasons, Respondents ask the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH ONCALE, PETITIONER

v.

SUNDOWNER OFFSHORE SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, protects employees from sexual harassment by supervisors and coworkers of the same gender.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-568

JOSEPH ONCALE, PETITIONER

v.

SUNDOWNER OFFSHORE SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. From August to November 1991, petitioner Joseph Oncale was employed by Sundowner Offshore Services, Inc., on an offshore oil rig. He filed this Title VII action against Sundowner; John Lyons, his Sundowner supervisor; and Danny Pippin and Brandon Johnson, two Sundowner coworkers, alleging

sexual harassment by Lyons, Pippin, and Johnson.[1] His complaint alleges three specific incidents of physical harassment. First, Pippin held petitioner down while Lyons put his exposed penis on the back of petitioner's head. Second, Johnson held petitioner down while Lyons placed his exposed penis on petitioner's arm. In the final episode, Pippin and Lyons grabbed petitioner in the shower and Lyons forced a bar of soap between petitioner's buttocks. In addition, the complaint alleges that Lyons and Pippin repeatedly made vulgar and demeaning remarks, both during these three incidents and on other occasions. Compl. ¶¶ 8A-8D.

In deposition testimony, petitioner stated that Lyons, Pippin, and Johnson all grabbed petitioner's buttocks at different times and that Lyons verbally harassed him, saying, "[y]ou know you got a cute little ass," Oncale Dep. 40, and stating his intention to have sex with him: "I'm going to get you. You're going to give it to me," *id.* at 42. Petitioner also testified that, during the shower incident, Lyons threatened him with anal intercourse. *Id.* at 58. In an affidavit filed with the Equal Employment Opportunity Commission (EEOC), petitioner states that Lyons threatened him with anal intercourse during the first incident as well. Oncale Aff. 2.

Petitioner states (Pet. 6) that he informed the employer's highest ranking on-site representative about the harassment, but that nothing was done to halt or punish it. Oncale quit shortly after the shower incident. *Ibid.* He alleges both *quid pro quo* and hostile work environment sexual harassment.

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[1] We refer to respondents collectively as "Sundowner" or "respondent."

2. The district court granted summary judgment to Sundowner. Pet. App. 10-15. It relied on *Garcia* v. *Elf Atochem North America*, 28 F.3d 446 (1994), in which the Fifth Circuit "clearly articulated its position that same sex harassment does not state a claim under Title VII." Pet App. 12. The district court also concluded that Pippin and Johnson could not be considered employers under Title VII. *Id.* at 14.

3. The court of appeals affirmed, Pet. App. 1-7, likewise reading *Garcia* as binding precedent "bar[ring] all same-sex sexual harassment claims," *id.* at 5.

DISCUSSION

In our view, the court of appeals erred in holding that Title VII "bar[s] all same-sex sexual harassment claims." Pet. App. 5. The plain language of the statute, prior decisions of this Court, and longstanding guidelines of the EEOC all support the conclusion that Title VII protects all employees from sex discrimination, without regard to the gender of the harasser or the victim. As there is a conflict among the courts of appeals on this question, further review by this Court is appropriate.

1. a. Under the Fifth Circuit's approach, Title VII offers no recourse to an employee who complains of gender-based harassment by a supervisor or coworker of the same gender. That categorical rule is contrary to the plain language of Title VII, which states simply that it is "an unlawful employment practice for an employer * * * to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national

origin." 42 U.S.C. 2000e-2(a)(1). This Court has held that an employer discriminates because of sex with respect to conditions of employment when it permits or "requir[es] people to work in a discriminatorily hostile or abusive environment." *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). Such a hostile environment may be caused not only by overtly sexual behavior, but also by "discriminatory intimidation, ridicule and insult," *ibid.* (quoting *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986)), that are "sufficiently severe or pervasive to alter the conditions of the victim's employment" 510 U.S. at 21 (quoting *Meritor Savings Bank*, 477 U.S. at 67). An employer discriminates through *quid quo pro* sexual harassment when it uses "submission to or rejection of" "[u]nwelcome sexual advances, requests for sexual favors, [or] other verbal or physical conduct of a sexual nature" as the basis for employment decisions. 29 C.F.R. 1604.11(a).

On its face, Title VII's gender-neutral prohibition of sex discrimination extends to both opposite-sex and same-sex discrimination, as long as the challenged conduct occurred "because of" the victim's sex. Compare, for example, a female supervisor who denied female employees promotions because of her personal preference to work with men, and a male supervisor who denied female employees promotions for the same reason. Simple logic and the language of the statute dictate that, in each case, the inquiry should be identical: whether the employee's gender was a basis for the supervisor's employment decision. 42 U.S.C. 2000e-2(a), 2000e-2(m). It should be irrelevant whether the supervisor and employee are of the same or opposite sex.

If Congress had meant to limit the reach of Title VII to discrimination against the opposite sex, it easily could have said so. Cf. *United States* v. *Turkette*, 452 U.S. 576, 581 (1981) (if Congress had intended RICO solely to protect against infiltration of "legitimate" enterprises, it could have inserted "legitimate" in the definition of "enterprise"). Instead, Congress drafted a provision that broadly prohibits discrimination because of sex, without regard to the gender of the victim or the discriminator.

Where, as here, "the statutory language is clear," the court's "sole function . . . is to enforce it according to its terms." *Rake* v. *Wade*, 508 U.S. 464, 471 (1993). The Court has followed this approach with respect to Title VII's prohibition on discrimination. Thus, in *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987), the Court recognized that Title VII's prohibition on discrimination "because of sex" prohibits discrimination against men as well as women. Similarly, in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court concluded that, because the terms of the statute prohibit discrimination "against any individual" because of the individual's race, it prohibits discrimination against members of any racial group, minority or majority. *Id.* at 279 (citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971)).

b. Nothing in the legislative history contradicts or casts doubt on the plain reading of this gender-neutral provision. See generally *Ardestani* v. *INS*, 502 U.S. 129, 135-136 (1991) (presumption that statutory language expresses congressional intent cannot be rebutted except in "rare and exceptional circumstances"). As this Court recognized in *Meritor Savings Bank*, 477 U.S. at 63-64, the prohibition

against sex discrimination was added to Title VII "at the last minute on the floor of the House of Representatives," and "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"

Moreover, even accepting respondent's contention that Congress's primary focus in enacting Title VII's gender provision was discrimination against women, it does not follow, as respondent claims (Br. in Opp. 5, 9), that Title VII has only that "limited purpose."[2] This Court has "never required that every permissible application of a statute be expressly referred to in its legislative history"; rather, it applies the broad language of the statute to the specific conduct that falls within that language. *Moskal* v. *United States*, 498 U.S. 103, 111 (1990); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history."). The specific conduct of same-gender sexual harassment clearly falls within Title VII's broad, gender-neutral prohibition of discrimination on the basis of sex.

c. The Fifth Circuit's blanket rule barring same-gender sexual harassment claims under Title VII

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[2] Cf. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 679 (1983) (although "congressional discussion [of the Pregnancy Discrimination Act] focused on the needs of female members of the work force rather than spouses of male employees," this creates no "'negative inference' limiting the scope of the act to the specific problem that motivated its enactment") (quoting *Turkette*, 452 U.S. at 591); *McDonald*, 427 U.S. at 289 (while the "immediate impetus for [42 U.S.C. 1981] was the necessity for further relief of the constitutionally emancipated former Negro slaves," it also reaches claims of race discrimination against whites).

finds no support in this Court's sexual harassment decisions, which articulate Title VII's mandate in broad, gender-neutral terms. In *Meritor Savings Bank*, 477 U.S. at 64, the Court stated that, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." Simply stated, "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Id.* at 66; see also *Harris*, 510 U.S. at 21. In explaining the rationale for recognizing sexual harassment as a form of actionable discrimination, the Court again spoke in inclusive, gender-neutral terms: "Surely, a requirement that a *man or woman* run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." *Meritor Savings Bank*, 477 U.S. at 67 (quoting *Henson* v. *City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)) (emphasis added).

Indeed, in *Harris* the Court reiterated that Title VII "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of *men and women*' in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." 510 U.S. at 21 (quoting *Meritor Savings Bank*, 477 U.S. at 64 (quoting *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978))) (emphasis added) (some internal quotation marks omitted). By logical extension, if Title VII's language does not require that the victim be of a particular gender, or that the harasser be of a particular gender, it should not be read to require

that the victim be of a particular gender in relation to the harasser.

d. The Fifth Circuit's categorical ban on same-gender sexual harassment claims is contrary to the EEOC's consistent interpretation of Title VII. EEOC guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank*, 477 U.S. at 65 (quoting *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141-142 (1976)); see *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) (EEOC's interpretation of Title VII "need only be reasonable to be entitled to deference"). Since the EEOC's first pronouncement on this subject in 1981, it has consistently read the statute to prohibit same-gender sexual harassment.[3] Because the EEOC's guidelines

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[3] Since 1981, the EEOC Compliance Manual has stated:

> The victim does not have to be of the opposite sex from the harasser. * * * [T]he crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way.

II EEOC Comp. Man., § 615.2(b)(3) (Oct. 1981). In its first decision addressing same-gender sexual harassment, the EEOC reaffirmed that "a discriminatory practice is unlawful when it occurs because an individual is a male or a female." EEOC Dec. No. 81-16 (Jan. 1981), *reprinted in* EEOC Dec. (CCH) at 4796 (1983 ed.). Thus, if a male employee was laid off because he rejected the unwanted sexual advances of his male supervisor, the employer would be liable for a Title VII violation. *Id.* at 4797 & n.7 (citing 29 C.F.R. 1604.11(c)).

on same-gender sexual harassment are fully consistent with the language of the statute and have not changed over time, they are entitled to weight. Cf. *Gilbert*, 429 U.S. at 141-142 (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).

e. The Fifth Circuit's two published decisions on same-gender sexual harassment fail to consider the text or history of the statute, this Court's Title VII precedents, or the EEOC's consistent interpretation of the statute. The Fifth Circuit's decisions advance no principles of statutory construction that would justify reading Title VII's prohibition on sex discrimination to exclude same-gender sexual harassment. The decision below does not analyze the relevant statutory language at all. It simply reads the Fifth Circuit's prior decision in *Garcia*, 28 F.3d at 451, to "bar[] all same-sex sexual harassment claims." Pet. App. 5. *Garcia* itself provides virtually no analysis. Its discussion of same-gender sexual harassment reads, in its entirety:

> Finally, we held in *Giddens* v. *Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished), that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Accord Goluszek* v. *Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). Thus, what [the putative supervisor] did to [the employee] could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.

28 F.3d at 451-452.

Respondent likewise provides no rationale for limiting the natural scope of Title VII's language to exclude same-gender sexual harassment. While conceding that Title VII prohibits "discriminat[ion] against women because they are women and against men because they are men," Br. in Opp. 6 (quoting *Ulane* v. *Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985)), and that "same-gender discrimination can be a form of 'sexual harassment,'" respondent simply asserts, without support, that same-gender sex discrimination "is beyond the reach of Title VII." Br. in Opp. 7.

2. There is a conflict among the courts of appeals on whether and when same-gender sexual harassment can create a hostile work environment in violation of Title VII. The Fifth Circuit's categorical ban on all such claims conflicts with decisions of the Fourth, Sixth, and Eighth Circuits. See *Yeary* v. *Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997); *Wrightson* v. *Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996); *Quick* v. *Donaldson Co.*, 90 F.3d 1372, 1378-1379 (8th Cir. 1996); *Hopkins* v. *Baltimore Gas & Elec. Co.*, 77 F.3d 745, 753 (4th Cir.), cert. denied, 117 S. Ct. 70 (1996); *McWilliams* v. *Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir.), cert. denied, 117 S. Ct. 72 (1996).

The Fourth Circuit has held that same-gender hostile work environment claims are actionable under Title VII "where a homosexual * * * employer discriminates against an employee of the same sex or permits such discrimination against an employee by homosexual employees of the same sex." *Wrightson*, 99 F.3d at 143. A divided panel of the Fourth Circuit has held, however, that "such a claim does not lie where both the alleged harassers and the victim are

heterosexuals of the same sex." *McWilliams*, 72 F.3d at 1195. The Sixth Circuit has held that same-gender sexual harassment can create a hostile work environment in violation of Title VII, at least where the harasser is a homosexual who selects his victim based on sexual attraction. *Yeary*, 107 F.3d at 448. The Sixth Circuit expressly declined to decide whether same-gender sexual harassment is actionable where the harasser is not a homosexual. *Ibid.* Finally, the Eighth Circuit has held that a male plaintiff can maintain a Title VII claim based on gender-based physical and verbal harassment by male coworkers, without requiring that the plaintiff allege or prove that the coworkers were homosexuals. *Quick*, 90 F.3d at 1378-1379.[4]

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[4] Other circuits have stated in dicta that same-gender sexual harassment is actionable under Title VII. See *Baskerville* v. *Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) ("[s]exual harassment of women by men is the most common kind," but "we do not mean to exclude the possibility that sexual harassment of * * * men by other men, or women by other women would not also be actionable in appropriate cases"); *Steiner* v. *Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) ("we do not rule out the possibility that *both* men and women * * * have viable claims against [the male supervisor] for sexual harassment"), cert. denied, 513 U.S. 1082 (1995); *Saulpaugh* v. *Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring) ("harassment is harassment regardless of whether it is caused by a member of the same or opposite sex"), cert. denied, 510 U.S. 1164 (1994); *Bundy* v. *Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (rejecting argument that harassment of employee by homosexual supervisor of same gender is not sex discrimination and noting that "in each instance the question is * * * would the complaining employee have suffered the harassment had he or she been of a different gender?"); *Barnes* v. *Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (noting possibility of actionable

We agree with the Eighth Circuit that an employee can state a Title VII claim based on harassment by a supervisor or coworker of the same gender without alleging that the harasser is a homosexual or that the harassment was based on sexual attraction. Under Title VII, "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Meritor Savings Bank*, 477 U.S. at 66. The severe or pervasive "discriminatory intimidation, ridicule, and insult" that violate Title VII, *Harris*, 510 U.S. at 21 (quoting *Meritor Savings Bank*, 477 U.S. at 65), may well result not from sexual attraction, but from the harasser's aggression, abuse of power, prejudice, or other underlying motivation. Thus, if male supervisors are abusive toward male employees, but polite toward female employees, this can constitute discrimination "because of sex," without regard to whether the abuse reflects disdain, desire, or some other underlying motivation. See *Quick*, 90 F.3d at 1378-1379 (male plaintiff stated hostile work environment claim based on allegations that male employees physically abused male coworkers, but not female coworkers).

As yet, there is no circuit conflict on whether same-gender *quid pro quo* claims are cognizable under Title VII. All three Fourth Circuit cases involved only hostile work environment claims, *Wrightson*, 99 F.3d at 138; *Hopkins*, 77 F.2d at 754; *McWilliams*, 72 F.3d at 1195. In *McWilliams*, 72 F.3d at 1195 n.4, that court expressly reserved the question whether other Title VII same-sex discrimination

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sexual harassment where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender").

claims are actionable. Similarly, the Eighth Circuit faced only a hostile work environment claim in *Quick*, 90 F.3d at 1377, and there was no mention of any *quid pro quo* harassment in *Yeary*, 107 F.3d at 443. Finally, it is not clear whether the court below considered petitioner's *quid pro quo* claim; its decision spoke only in general terms of sexual harassment, see Pet. App. 1-4, and relied exclusively on *Garcia*, 28 F.3d at 451-452, which was strictly a hostile work environment case. Although the courts of appeals thus have not addressed the question, there is no basis for distinguishing hostile work environment from *quid pro quo* harassment for purposes of deciding whether same-gender harassment because of sex is prohibited by Title VII. There is a circuit conflict on that basic issue.

3. This case presents an appropriate vehicle to consider the legal question whether same-gender sexual harassment ever is actionable under Title VII. It may not, however, provide an opportunity for this Court to resolve certain additional questions that may accompany a claim of same-gender sexual harassment. First, because the lower courts disposed of petitioner's claim on the purely legal basis that it was barred by Fifth Circuit precedent, this case comes to the Court without any development or analysis of the facts.[5] Neither court discussed the

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[5] The district court did conclude, based on an affidavit submitted by Sundowner's personnel director, that Pippin and Johnson could not be considered petitioner's "employers" for purposes of Title VII liability. Pet. App. 14-15 & n.4. The court's consideration of the record evidence was limited, however, to determining Pippin's and Johnson's status.

Moreover, the district court's conclusions about Pippin's and Johnson's status as coworkers, which petitioner does not chal-

nature of the harassment petitioner suffered or addressed his contention that it was based on his gender. Neither court considered petitioner's contention that his supervisor's and coworkers' threat of anal intercourse went beyond mere "horseplay" to constitute "severe and pervasive" harassment because of sex. See Plaintiff's Opp. to Mot. for Summ. Judg. 9-12. By the same token, neither court considered respondent Sundowner's contention that the alleged harassment could not be "because of sex" where there was no evidence that petitioner's supervisor or coworkers harassed him because of his gender or treated men and women differently on the basis of gender. Resp. C.A. Br. 15. Accordingly, in its present posture, this case has "a rather abstract quality" that might not be conducive to the announcement of "definitive rule[s]" governing when and under what circumstances same-gender sexual harassment violates Title VII. *Meritor Savings Bank*, 477 U.S. at 72.

In addition, this case arises in the unusual factual context of an all-male work environment. Unlike many gender discrimination plaintiffs, petitioner cannot support his contention that he was discriminated against because of his sex by demonstrating that coworkers of the opposite sex were not exposed to the same disadvantageous terms and conditions of employment. Cf. *Kopp* v. *Samaritan Health Sys., Inc.*, 13 F.3d 264, 268 (8th Cir. 1993) (female plaintiff demonlenge, is not dispositive of Sundowner's liability. Sundowner may be liable for harassment by petitioner's coworkers if its agents had notice of the harassment and failed to take steps to stop it, see 28 C.F.R. 1604.11(d), or for the actions of Lyons, who all concede was petitioner's supervisor, see *Meritor Savings Bank*, 477 U.S. at 72.

strated that supervisor's abuse was gender-based by showing that his "treatment of female employees [wa]s worse then his treatment of male employees").[6] We do not suggest, however, that a comparison between male and female employees is indispensable. Nothing in the text of Title VII denies its protections to employees in a single-gender workplace.

[6] As in cases involving opposite-sex harassment, an inquiry into the relative treatment of members of each sex is often useful in cases of same-gender sexual harassment. See *Yeary*, 107 F.3d at 448 (male Title VII plaintiff harassed by male supervisor suffered an "institutional disadvantage" in that "[h]e had to put up with abuse and harassment that women there did not have to endure"); *Quick*, 90 F.3d at 1378-1379; *Wrightson*, 99 F.3d at 142 (concluding that male Title VII plaintiff stated claim for sexual harassment where he alleged that his male supervisor and coworkers sexually harassed certain male employees, but no female employees); *Waag* v. *Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 403 (D. Minn. 1996) (male plaintiff demonstrated discriminatory gender-based harassment by demonstrating that male supervisor's sexual advances were directed only at male employees); *EEOC* v. *Walden Book Co.*, 885 F. Supp. 1100, 1104 (M.D. Tenn. 1995) (where male supervisor makes offensive sexual advances to a "subordinate of the same sex, and not * * * to employees of the opposite sex, it absolutely is a situation where, but for the subordinate's sex, he would not be subjected to that treatment"); *Sardinia* v. *Dellwood Foods, Inc.*, No. 94 Civ. 5458 (LAP), 1995 WL 640502, at *4-*5 (S.D.N.Y. Nov. 1, 1995) (denying employer's motion to dismiss Title VII claim where male plaintiff alleged that two male supervisors physically and verbally harassed male employees, but not female employees); *McCoy* v. *Johnson Controls World Servs., Inc.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995) (denying employer's motion to dismiss where female plaintiff alleged sexual harassment by female coworkers and there was no suggestion that harassers also harassed male employees).

The aforementioned factors may make it difficult for the Court to give comprehensive consideration to how a Title VII plaintiff can state and prove a claim for same-gender sexual harassment. Nonetheless, we believe the Court should grant certiorari in this case to resolve the purely legal question of whether same-gender sexual harassment ever is actionable under Title VII. If, as we urge, the Court concludes that it is, the Court may then remand the case for consideration of the merits of petitioner's contention that he was discriminated against because of his sex. That disposition would afford an opportunity for the courts of appeals to address in the first instance the various evidentiary and other issues that may arise in connection with same-gender harassment claims.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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In The

Supreme Court of the United States

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JOSEPH ONCALE,

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versus

SUNDOWNER OFFSHORE SERVICES, INCORPORATED; JOHN LYONS; DANNY PIPPEN; AND BRANDON JOHNSON,

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Proceedings include all events.
2:94cv1483 Oncale v. Sundowner
Offshore, et al TERMED MAG-4

TERMED MAG-4

U.S. District Court
USDC for the Eastern District of Louisiana (New Orleans)

CIVIL DOCKET FOR CASE #: 94-CV-1483

Oncale v. Sundowner Offshore, et al
Assigned to: Judge G. Thomas Porteous, Jr.
Demand: $0,000
Lead Docket: None
Dkt# in other court: None

Filed: 05/05/94
Jury demand: Plaintiff
Nature of Suite: 442
Jurisdiction: Federal Question

Cause: 42:2000e Job Discrimination (Employment)

JOSEPH ONCALE
plaintiff

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Nicholas Canaday, III
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v.

SUNDOWNER OFFSHORE SERVICES, INC. defendant	Thomas Joseph Smith 504-525-2456 FAX [COR LD NTC] Galloway, Johnson, Tompkins & Burr One Shell Square 701 Poydras St. Suite 4040 New Orleans, LA 70139 (504) 525-6802 Jeffrey L. Rogers [COR LD NTC] Christopher M. Brown [COR] Brown, Parker & Leahy 3600 Citicorp Center 1200 Smith St. Houston, TX 77002 (713) 654-8111
JOHN LYONS defendant	Thomas Joseph Smith (See above) [COR LD NTC] Jeffrey L. Rogers (See above) [COR LD NTC] Christopher M. Brown (See above) [COR]
DANNY PIPPEN defendant	Thomas Joseph Smith (See above) [COR LD NTC] Jeffrey L. Rogers (See above) [COR LD NTC] Christopher M. Brown

	(See above) [COR]
BRANDON JOHNSON defendant	Thomas Joseph Smith (See above) [COR LD NTC] Jeffrey L. Rogers (See above) [COR LD NTC] Christopher M. Brown (See above) [COR]

5/5/94	1	COMPLAINT (O summons(es) issued) (sr) [Entry date 05/10/94] [Edit date 05/10/94]
5/5/94	–	Payment of filing fee by plaintiff Joseph Oncale in amount of $ 120.00 (sr) [Entry date 05/10/94]
5/10/94	–	Automatic Referral (Utility Event) to Magistrate Ronald Fonseca (sr)
6/23/94	2	WAIVER OF SERVICE sent to defendant Sundowner Offshore on 5/16/94 (bb)
7/14/94	3	ANSWER by defendant Sundowner Offshore, defendant John Lyons, defendant Danny Pippen, defendant Brandon Johnson to complaint by plaintiff Joseph Oncale [1-1] (bb) [Entry date 07/18/94]
7/20/94	4	MINUTE ENTRY (7/19/94): Status Conf set 2:45 8/8/94 by Magistrate Ronald Fonseca (bb)
8/9/94	5	MINUTE ENTRY (8/8/94): Status Conf held 2:45 8/8/94; parties do not consent to trial by Mag; pla has req jury trial by Magistrate Ronald Fonseca (bb)

8/10/94	6	NOTICE/ORDER that a preliminary conference is scheduled by telephone before courtroom deputy at 9:30 9/13/94 by Clerk (jas)
9/13/94	7	MINUTE ENTRY (9/13/94): Preliminary Conference held; amendments due within 30 days. ; pretrial conf set 8:30 3/30/95 ; jury trial set 10:00 4/10/95 ; by Judge Veronica D. Wicker (jas)
12/8/94	8	MINUTE ENTRY (12/7/94): Case reassigned to Judge Wicker/Porteous by Judge Ginger Berrigan (bb)
12/15/94	9	Notice that Case is permanently reassigned to Judge G. T. Porteous Jr. by Clerk (jd)
1/5/95	10	ORDER that the Pre-Trial Conference is set for 8:30 a.m. on 3/30/95 in chambers, jury trial is set for 4/10/95 at 10:00 a.m.; all other established & cut off will remain unchanged by Judge G. T. Porteous Jr. (dp)
1/6/95	11	Motion by defendant Sundowner Offshore, defendant John Lyons, defendant Danny Pippen, defendant Brandon Johnson and ORDER for attorneys Jeffrey L. Rogers & Christopher M. Brown to appear pro hac vice by Judge Ginger Berrigan Date Signed: 1/11/95 (gw) [Entry date 01/13/95]
2/1/95	12	Witness list submitted by defendant John Lyons, defendant Danny Pippen, defendant Brandon Johnson, and Sundowner Offshore (rew) [Entry date 02/02/95] [Edit date 03/14/95]

2/1/95	13	Witness list submitted by defendant John Lyons, defendant Danny Pippen, defendant Brandon Johnson, defendant Sundowner Offshore (rew) [Entry date 02/02/95]
2/1/95	14	Exhibit list by defendant John Lyons, defendant Danny Pippen, defendant Brandon Johnson, defendant Sundowner Offshore (rew) [Entry date 02/02/95]
2/1/95	15	Exhibit list by plaintiff Joseph Oncale (rew) [Entry date 02/02/95]
2/1/95	16	Witness list submitted by plaintiff Joseph Oncale (rew) [Entry date 02/02/95]
2/1/95	17	Written report of experts who may be called as witnesses for plaintiff submitted by plaintiff Joseph Oncale (rew) [Entry date 02/02/95]
2/7/95	18	MOTION by defendant John Lyons, defendant Danny Pippen, defendant Brandon Johnson, defendant Sundowner Offshore for summary judgment on ground that there is no genuine issue of material fact; no hrg date set. (dp)
2/7/95	19	MINUTE ENTRY (2/7/95): ORDERED that motion by dfts, Dundowner Offshore, et al for summary judgment on ground that there is no genuine issue of material fact [18-1] previously set for 2/7/95 is CONT to 3/8/95 by at 9:30 a.m. Judge G. T. Porteous Jr. (dp) [Entry date 02/08/95]
3/1/95	20	Memo in opposition by plaintiff Joseph Oncale to motion for summary judgment on ground that there is no genuine issue of material fact [18-1] filed by defendant John

Lyons, defendant Danny Pippen, defendant Brandon Johnson, defendant Sundowner Offshore (dp)

3/10/95 21 ORDER – Hrg held 3/8/95 that the motion by dft, Sundowners for summary judgment on ground that there is no genuine issue of material fact [18-1] is submitted by Judge G. T. Porteous Jr. (dp) [Entry date 03/13/95]

3/24/95 22 JUDGMENT: in favor of dfts, Sundowner Offshore Services, John Lyons, Danny Pippen, & Brandon Johnson & agst pla, Joseph Oncale, dismissing pla's claims w/prej by Judge G. T. Porteous Jr. . .CASE CLOSED. (dp) [Edit date 10/24/96]

3/24/95 23 MINUTE ENTRY (3/23/95): ORDER granting dfts' mtn for sum jgm on ground that there is no genuine issue of material fact [18-1]. by Judge G. T. Porteous Jr. (dno)

4/19/95 24 Notice of appeal by pla Joseph Oncale from Dist. Court jgm entered 3/24/95. (dno)

4/19/95 25 Motion by plaintiff Joseph Oncale and ORDER for appearance of Nicholas Canaday III for same is GRANTED by Judge G. T. Porteous Jr. (dp) [Entry date 04/21/95]

6/1/95 – Payment of fee by plaintiff Joseph Oncale in amount of $ 105.00 (dp) [Entry date 06/02/95]

6/1/95 26 Transcript order by pla, Joseph Oncale of hrg held 3/8/95 on mtn for summary judgment. (dp) [Entry date 06/06/95]

8/21/95 27 Transcript of proceedings bfr Judge Porteours 3/8/95 (kh) [Entry date 08/25/95]

8/25/95 – Record on Appeal sent to 5th Circuit Court of Appeals consisting of 1 volume, 1 volume of transcripts. (Appeal No. 95-30510) (dp) [Entry date 08/29/95]

7/23/96 28 Judgment from 5th Circuit Court of Appeals affirming the decision of the District Court [24-1] by (Circuit Judges, Smith Duhe' & Demoss) ; Issued as mandate on 7/22/96 (dp) [Entry date 08/01/96]

8/13/96 – Record on appeal returned from U.S. Court of Appeals consisting of 2 volumes. (dp) [Entry date 08/16/96]

[END OF DOCKET: 2:94cv1483]

General Docket
Fifth Circuit Court of Appeals

95-30510 **95-30510**

Court of Appeals Docket #: 95-30510 Filed: 5/24/95
Nsuit: 3442 Civil Rights: Jobs
Oncale v. Sundowner Offshr, et al

Appeal from: Eastern District of Louisiana, New Orleans

Lower court information:

District: 053L-2 : CA-94-1483-T
Court Reporter: Victor D DiGiorgio, US Court Reporter
Ordering Judge: G Thomas Porteous, Jr, US District Judge
Date Filed: 5/5/94
Date Order/judgment: 3/24/95
Date NOA filed: 4/19/95

Fee status: Paid

Prior cases:
None
Current cases:
None

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Defendant - Appellee

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[COR NTC ret]
Robert Lee Galloway
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[COR NTC ret]

DANNY PIPPEN
Defendant - Appellee

James R Leahy
(See above)
[COR LD NTC ret]

Christopher M Brown
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[COR NTC ret]
Robert Lee Galloway
(See above)
[COR NTC ret]

BRANDON JOHNSON
Defendant - Appellee

James R Leahy
(See above)
[COR LD NTC ret]

Christopher M Brown
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JOSEPH ONCALE
Plaintiff - Appellant

v.

SUNDOWNER OFFSHORE SERVICES
INCORPORATED; JOHN LYONS; DANNY PIPPEN;
BRANDON JOHNSON
Defendants - Appellees

5/24/95	Civil rights case docketed. NOA filed by Appellant Joseph Oncale. [95-30510] Transcript Order due on 6/8/95 for Joseph Oncale. Fee due on 6/5/95 for Joseph Oncale. (ccb)
6/1/95	Fee paid by Appellant Joseph Oncale. [95-30510] Fee ddl satisfied. (ccb)
6/1/95	Transcript order received from Appellant Joseph Oncale for Vic DiGiorgio. [95-30510] Transcript Order ddl satisfied. Ct. Reporter Acknowledgment due on 6/16/95 for Victor D DiGiorgio. (ccb)
6/9/95	Appearance form filed by Nicholas Canaday for Appellant Joseph Oncale, Andre C LaPlace for Appellant Joseph Oncale. [95-30510] (dse)
6/14/95	Appearance form filed by Christopher M Brown for Appellee Brandon Johnson, Appellee Danny Pippen, Appellee John Lyons, Appellee Sundowner Offshr, Jeffrey L Rogers for Appellee Brandon Johnson, Appellee Danny Pippen, Appellee John Lyons, Appellee Sundowner Offshr. [95-30510] (dmd)
6/29/95	Transcript order acknowledgment received from Court Reporter Victor D DiGiorgio. Estimated pages: 50 Date Financial arrangements Made: 6/23/95 [95-30510] Ct. Reporter Acknowledgement ddl satisfied. Transcript

due on 8/22/95 for Victor D DiGiorgio. Ct. Reporter Discount Date is 8/22/95 for Victor D DiGiorgio. (pok)

8/28/95 Transcript filed in district court by Court Reporter Victor D DiGiorgio on 08/21/95. [95-30510] Transcript ddl satisfied. Ct. Reporter Discount Date canceled. (cgl)

8/28/95 Record on appeal filed, Volumes: 2. [95-30510] (cgl)

8/29/95 Briefing notice issued. [95-30510] A/Pet's Brief due on 10/10/95 for Joseph Oncale. (cgl)

8/29/95 Record on appeal released to attorney Andre C LaPlace for Appellant Joseph Oncale. Volumes: 2. [95-30510] (cgl)

10/10/95 Record on appeal returned to 5CCA. Volumes: 2 [95-30510] (cgl)

10/10/95 Appellant's Brief filed by Appellant Joseph Oncale. Copies of brief: 7 # of pages: 23. Sufficient [Y/N]: n sani serif & cos does not comply. [95-30510] A/Pet's Brief ddl satisfied. E/Res's Brief due on 11/9/95 for Brandon Johnson, for Danny Pippen, for John Lyons, for Sundowner Offshr. Sufficient Brief due on 10/20/95 for Joseph Oncale. (cgl)

10/10/95 Record excerpts filed by Appellant Joseph Oncale # of copies: 4 Sufficient [Y/N]: y. [95-30510] (cgl)

10/13/95 Record on appeal released to attorney Christopher M Brown for Appellee Brandon Johnson, Appellee Danny Pippen, Appellee John Lyons, Appellee Sundowner Offshr. Volumes: 2. [95-30510] (cgl)

10/18/95 Brief/Rec. exc made sufficient by Appellant Joseph Oncale [95-30510] Sufficient Brief ddl satisfied. (cgl)

10/26/95 Amicus curiae brief filed by Amicus Curiae EEOC. Copies of Brief: 8 # of pages: 20. Sufficient [Y/N]: y. [95-30510] (cgl)

10/31/95 Extension granted by phone until: 11/30/95 to file appellee's brief for Appellee Sundowner Offshr, Appellee John Lyons, Appellee Danny Pippen, Appellee Brandon Johnson. [95-30510] (ksw)

11/6/95 Appearance form filed by Mary L Clark for Amicus Curiae EEOC. [95-30510] (cgl)

11/9/95 Confirmation letter filed by Appellee Sundowner Offshr, Appellee John Lyons, Appellee Danny Pippen, Appellee Brandon Johnson confirming an extension of time to and including 11/30/95 for filing brief. [95-30510] E/Res's Brief ddl updated to 11/30/95 for Brandon Johnson, for Danny Pippen, for John Lyons, for Sundowner Offshr. (cgl)

12/4/95 Record on appeal returned to 5CCA. Volumes: 2 [95-30510] (cgl)

12/4/95 The attorney Thomas J. Smith for Sundowner Offshr, attorney Thomas J. Smith for John Lyons, attorney Thomas J. Smith for Danny Pippen, attorney Thomas J. Smith for Brandon Johnson not participating in case. [95-30510] (cgl)

12/4/95 Brief filed by Appellee Brandon Johnson, Appellee Danny Pippen, Appellee John Lyons, Appellee Sundowner Offshr. Copies of Brief: 8 # of pages: 23. Sufficient [Y/N]: n. cert of service does not comply. [95-30510] E/Res's

Brief ddl satisfied. Reply Brief due on 12/18/95 for Joseph Oncale. Sufficient Brief due on 12/14/95 for Sundowner Offshr, for John Lyons, for Danny Pippen, for Brandon Johnson. (cgl)

12/5/95 Brief/Rec. exc made sufficient by Appellee Brandon Johnson, Appellee Danny Pippen, Appellee John Lyons, Appellee Sundowner Offshr [95-30510] Sufficient Brief ddl satisfied. (cgl)

12/28/95 Briefing Complete. [95-30510] Reply Brief ddl canceled. (cgl)

1/17/96 Case tentatively calendared for oral argument Week of: 04/01/96. [95-30510] (gam)

1/23/96 Supplemental authorities (FRAP 28(j)) filed by Amicus Curiae EEOC [206856-1]. [95-30510] (cgl)

1/26/96 Supplemental authorities (FRAP 28(j)) filed by Amicus Curiae EEOC [209594-1]. [95-30510] (cgl)

2/22/96 Case calendared for oral argument. [95-30510] (sme)

3/7/96 Motion filed by Amicus Curiae EEOC for leave to present oral argument on 5 minutes of time ceded by appellant. [243092-1] [95-30510] (sbv)

3/14/96 COURT Order filed granting motion of amicus curiae, EEOC to participate in oral argument on five minutes of time ceded by appellant. [243092-1] (JES) Copies to all counsel. [95-30510] (sme)

3/19/96 Supplemental authorities (FRAP 28(j)) filed by Amicus Curiae EEOC [250654-1]. [95-30510] (sme)

4/1/96 Oral argument heard. Case argued by Nicholas Canaday for Appellant Joseph Oncale, Jeffrey L Rogers for Appellee Sundowner Offshr, Appellee John Lyons, Appellee Danny Pippen, Appellee Brandon Johnson, Mary L Clark for Amicus Curiae EEOC [95-30510] (sme)

5/20/96 Opinion filed. If published # of pages: 4 Iss'd in T form? n Issue Mandate due on 6/10/96. [95-30510] (rmf)

5/20/96 Judgment entered and filed. [95-30510] (rmf)

6/3/96 Suggestion filed by Appellant Joseph Oncale for rehearing en banc. # of copies filed: 20 [319481-1] issue Mandate ddl canceled. [95-30510] (cgl)

6/4/96 Motion filed by Amicus Curiae EEOC to file amicus brief in support of appellant's suggestion for rehearing en banc [319518-1] [95-30510] (cgl)

6/5/96 COURT Order filed granting motion to file amicus brief in support of appellant's suggestion for rehearing en banc [319518-1] (JMD) Copies to all counsel. [95-30510] (cgl)

6/5/96 Amicus curiae brief filed by Amicus Curiae EEOC in support of appellant's suggestion for rehearing en banc. Copies of Brief: 21 # of pages: 15. Date of COS: 5/31/96 Sufficient [Y/N]: y. [95-30510] (cgl)

6/18/96 The attorney Jeffrey L Rogers for Sundowner Offshr, attorney Jeffrey L Rogers for John

Lyons, attorney Jeffrey L Rogers for Danny Pippen, attorney Jeffrey L Rogers for Brandon Johnson not participating in case. [95-30510] (cgl)

7/5/96 Appearance form filed by Robert Lee Galloway for Appellee Sundowner Offshr, Appellee John Lyons, Appellee Danny Pippen, Appellee Brandon Johnson, James R. Leahy for Appellee Sundowner Offshr, Appellee John Lyons, Appellee Danny Pippen, Appellee Brandon Johnson. [95-30510] (cmb)

7/12/96 COURT Order filed denying suggestion for rehearing en banc [319481-1] With poll (Y/N)?: y Issue Mandate due on 7/19/96. (JES/JMD/HRD) Copies to all counsel. [95-30510] (cmb)

7/22/96 Mandate issued. Approved BOC Issued (Y/N)?: n [95-30510] Issue Mandate ddl satisfied. (cmb)

7/25/96 Record on appeal forwarded by CDK to JMD. [95-30510] (cmb)

8/9/96 Record on appeal returned to 5CCA. Volumes: 2 [95-30510] (cmb)

8/9/96 Record on appeal returned to USDC. Volumes: 2. [95-30510] (cmb)

10/11/96 Supreme Court notice that petition for certiorari was filed on 10/10/96 by Appellant Joseph Oncale. Supct No.: 96-568 (cmb)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	C.A. No. 94-1483
VERSUS	JUDGE: SECT. LMAG.4
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON	MAGISTRATE: (C) CIVIL COMPLAINT AND JURY DEMAND

****

COMPLAINT FOR DAMAGES

Plaintiff, **Joseph Oncale**, complains of the defendants and shows the Court the following:

JURISDICTION

1.

This is a claim for damages brought by an employee against his employer and some of his co-workers. The jurisdiction of the Court is found under 29 U.S.C. 1331, which allows the District Court of the United States jurisdiction where there exists a question or questions of Federal law.

PARTIES

2.

The plaintiff, **Joseph L. Oncale,** is a resident of and domiciled at 13679 Ventress Road, in the Town of Ventress, Parish of Pointe Coupee, State of Louisiana.

3.

The defendant, **Sundowner Offshore Services, Inc.,** is a foreign corporation, authorized to do and doing business in the State of Louisiana, and duly incorporated in the State of Nevada, whose principal place of business is in Texas, and whose agent for service of process is Prentice Hall Systems, Inc., 203 Carondelet Street, Suite 811, New Orleans, LA, 70130.

The defendant, **John Lyons,** is a resident of Lafourche Parish, State of Louisiana.

The defendant, **Danny Pippen,** is a resident of Plaquemines Parish, State of Louisiana.

The defendant, **Brandon Johnson,** is a resident of the State of Louisiana.

CAUSE OF ACTION

4.

This action is brought pursuant to the Civil Rights Act, as amended, at Section 703(a)(1) of Title VII, and 42 U.S.C., Sec. 2000 (e)-2 (a)(1). The jurisdiction of this Court is invoked to secure protection of and redress deprivation of rights guaranteed by Federal law which provides for injunctive and other relief against sexual discrimination and harassment in employment practices.

5.

The plaintiff, Joseph L. Oncale, is a citizen of the United States and resides in the Parish of Pointe Coupee, State of Louisiana. He is 24 years old and was employed

by Sundowner Offshore Services, Inc., as a roustabout on Chevron USA's offshore platform, 266-A and 266-B, Ship Shoal Block, in the Gulf of Mexico. On or about October 25, 1991 and October 26, 1991, the plaintiff was sexually harassed by his co-workers, defendants John Lyons, Danny Pippen, and Brandon Johnson, and as a result of continuous harassment, was forced to resign his position as a roustabout on November 10, 1991.

6.

The defendant, **Sundowner Offshore Services, Inc.,** is an employer with an office in Houma, Louisiana, who engages in an industry affecting commerce and employs more than twenty (20) regular employees.

7.

The plaintiff filed timely charges of sexual discrimination and harassment with the Equal Employment Opportunity Commission and has met all administrative prerequisites for bringing this action.

8.

The defendant, **Sundowner Offshore Services, Inc.,** engaged in policies and practices which willfully, or in the alternative unwillingly, discriminated against or allowed harassment against the plaintiff on the basis of his sex, including but not limited to the following acts:

A. allowing the harassment to continue after the plaintiff made several complaints to Sundowner supervisors;

B allowing the defendants, John Lyons and Danny Pippen, who were Sundowner supervisors, to continue in their supervisory position over the plaintiff after complaints were made.

The defendants, John Lyons, Danny Pippen, and Brandon Johnson intentionally discriminated against and harassed the plaintiff on the basis of his sex, including but not limited to the following acts:

A. Pippen holding the plaintiff down, while Lyons put his exposed penis on the back of the plaintiff's head, in front of the crew, on October 25, 1991;

B. Johnson grabbing and holding down plaintiff, while Lyons again put his exposed penis on the plaintiff's arm, on October 26. 1991;

C. Pippen and Lyons holding the plaintiff down in the shower, while Lyons rubbed a bar of soap between the cheeks of the plaintiff's buttocks;

D. the defendants, Lyons and Pippen, repeatedly making vulgar and demeaning remarks to the plaintiff during the above described incidents, as well as on other occasions;

E. any and all other sexually discriminatory and harassment practices against the plaintiff that will be proven at a trial on the merits of this matter.

10.

All of the above acts of the defendants violate the plaintiff's Title VII civil rights, as outlined in the Civil Rights Act of 1991, as amended, and 42 U.S.C., Sec. 2000 (e)-2(a)(1). The plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this action for (damages) is his only means of securing adequate relief.

WHEREFOR, the plaintiff, Joseph Oncale, respectfully prays that the Court:

A. Grant the plaintiff an order requiring the defendant, Sundowner Offshore Services, Inc., to reinstate the plaintiff to his former position or to a position similar in responsibilities and pay, taking into account any retroactive promotions, and to make the plaintiff whole, by an award of appropriate back pay, prejudgment interest, and fringe benefits including health and life insurance, retirement and pension benefits, and all expenses which the employer would have paid in the normal course of business, and otherwise, for the violations described above;

or, in the alternative,

If the defendants cannot reinstate the plaintiff, to enter an order which will make the plaintiff whole, by requiring the defendant to pay as damages to the plaintiff: appropriate back pay, front pay, and fringe benefits, including health and life insurance, retirement and pension benefits, and all expenses which the employer would have paid in the normal course of business, prejudgment interest, and other compensation to the plaintiff for the violations described above;

B. Enter judgment in favor of the plaintiff, Joseph Oncale, and against the defendants, Jon Lyons, Danny Pippen, and Brandon Johnson after due proceedings, for any and all damages as are reasonable in the premises as a result of the above-mentioned occurrences.

C. Award the plaintiff costs of this action, including reasonable attorney's fees and liquidated damages, and such other and further relief that this Court may deem just, proper and equitable;

D. Grant an order enjoining the defendants from engaging in such unlawful employment practices, and order any other affirmative action as may be appropriate in this circumstance;

E. For a trial by jury of this cause.

Respectfully Submitted,

Attorney for Petitioner:

/s/ Andre P. LaPlace
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	C.A. NO. 94-1483
VERSUS	JUDGE: SECT. L MAG. 4
SUNDOWNER OFFSHORE SERVICES INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON	MAGISTRATE: (C) CIVIL COMPLAINT AND JURY DEMAND

****

ANSWER OF DEFENDANTS SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN AND BRANDON JOHNSON

Sundowner Offshore Services, Inc. ("Sundowner"), **John Lyons** ("Lyons"), **Danny Pippen** ("Pippen") and **Brandon Johnson** ("Johnson"), Defendants (collectively, "Defendants") in this action, hereby answer the claims of the Plaintiff, **Joseph Oncale** ("Plaintiff"), alleging and stating the following:

FIRST DEFENSE

1. There is lack of jurisdiction over the subject matter and the person for the following reasons:

A. 29 U.S.C. 1331, cited by Plaintiff in Paragraph 1 of his original Complaint does not confer jurisdiction over the Defendants.

B. The facts alleged by Plaintiff complain of sexual harassment by a male to a male. These activities do not support a cause of action for sexual harassment under § 703(a)(1) of Title VII

and 42 U.S.C., § 2000(e)-2(a)(1) absent homosexual advances or intent on the part of the Defendants. Plaintiff has failed to allege any facts which would indicate homosexual motivation on behalf of any of the Defendants.

SECOND DEFENSE

2. Plaintiff has failed to state a cause of action upon which relief can be granted.

THIRD DEFENSE

For its third defense to the allegations of the Complaint, Defendants state and allege as follows:

3. Defendants deny the allegations of Paragraph 1 of the Complaint.

4. As to the allegations contained in Paragraph 2 of the Complaint, Defendants are without knowledge sufficient to admit or deny this paragraph.

5. Defendants admit the allegations contained in Paragraph 3 of the Complaint.

6. Defendants admit that the statute cited in Paragraph 4 of the Complaint addresses sexual harassment and sexual discrimination but deny that it is applicable to the alleged actions of the Defendants.

7. Defendants deny the allegations contained in Paragraph 5 of the Complaint.

8. Defendants admit the allegations contained in Paragraph 6 of the Complaint.

9. Defendants admit the allegations contained in Paragraph 7 of the Complaint.

10. Defendants deny the allegations contained in Paragraph 8 of the Complaint.

11. Defendants deny the allegations contained in Paragraph 10 of the Complaint.

AFFIRMATIVE DEFENSE

12. Defendants' affirmatively plead that Plaintiff has failed to assert proper grounds for jurisdiction over the subject matter or over the person.

13. The claims made by Plaintiff do not amount to sexual harassment pursuant to the Civil Rights Act as amended at § 703(a)(1) of Title VII and 42 U.S.C., § 2000(e)-2(a)(1) because the activity complained of was asserted by a male to another male without homosexual intent.

PRAYER

WHEREFORE, Defendants, Sundowner Offshore Services, Inc., John Lyons, Danny Pippen and Brandon Johnson, pray the following:

a. Plaintiff's claims be dismissed for lack of jurisdiction;

b. Plaintiff take nothing by reason of his complaint, that judgment be rendered in favor of Defendants;

c. Defendants be awarded their costs of suit incurred in defense of this action; and

d. For such other relief as the Court deems proper.

Respectfully submitted,

Attorneys for Defendants:

BROWN, PARKER & LEAHY, L.L.P.

By: /s/ Christopher M. Brown
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Answer was sent by United States certified mail, return receipt requested, on this 12th day of July, 1994, to Andre P. LaPlace, 2762 Continental Drive, Suite 103, Baton Rouge, Louisiana 70808.

/s/ Christopher M. Brown
CHRISTOPHER M. BROWN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE

V. C.A. NO. 94-1483

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPIN AND BRANDON JOHNSON JUDGE: SECT. T. MAG 4

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants Sundowner Offshore Services, Inc., John Lyons, Danny Pippin and Brandon Johnson, individually, and move the Court for summary judgment on the ground that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Under established law and Fifth Circuit precedent, the discrimination and harassment of which Plaintiff, a male, complains is not actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, et seq.

As part of his prima facie case, Plaintiff must prove that Defendants harassed and discriminated against him on the basis of his sex. A plaintiff must show that he was singled out and treated by the defendant differently than the defendant treated members of the opposite sex. Claims similar to Plaintiff's have been rejected by courts on the grounds that same sex discrimination of this type is not contemplated by Title VII. Because Plaintiff was working in an exclusively male environment, he will not

be able to establish a critical element of his prima facie case for discrimination and harassment.

Additionally, Johnson and Pippin are entitled to summary judgment as a matter of law since neither of these individuals acted as Plaintiff's employer, nor did they act in any supervisory capacity relative to the Plaintiff. Mere coworkers cannot be held liable for sexual discrimination or harassment under Title VII.

Because there are no genuine issues as to any material fact surrounding Plaintiff's claim, summary judgment is appropriate. Fed. R. Civ. P. 56.

Defendants respectfully move this Court to grant this Motion for Summary Judgment and pray for such other and further relief, both at law and in equity to which they may show themselves to be justly entitled.

This motion is based upon this document, the accompanying Memorandum in Support of Motion for Summary Judgment, all pleadings and papers on file in this action, and upon such other matters as may be presented to the court at the time of the hearing.

DATED: February 1, 1995

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day February 1995, a true and correct copy of the above and foregoing instrument was served on all counsel of record as follows, in accordance with the Federal Rules of Civil Procedure, via U.S. Postal Service, postage pre-paid.

Andre LaPlace
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Baton Rouge, LA 70808

/s/ Christopher M. Brown
Christopher M. Brown

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	C.A. NO. 94-1483
V.	JUDGE: SECT. T MAG. 4
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPIN, AND BRANDON JOHNSON	CIVIL COMPLAINT AND JURY DEMAND

DEFENDANTS SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPIN, AND BRANDON JOHNSON'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

Plaintiff brings this sexual discrimination and sexual harassment claim against Defendants Sundowner Offshore Services, Inc. ("Sundowner), John Lyons ("Lyons"), Danny Pippin ("Pippin"), and Brandon Johnson ("Johnson"), individually, pursuant to the Civil Rights Act of 1964, as amended, at Section 703(a)(1) of Title VII, and 42 U.S.C., Sec. 2000(e)-2(a)(1) ("Title VII"). Plaintiff was employed by Sundowner as a roustabout on an offshore well platform serviced by Sundowner, resigning his position after approximately five weeks. Plaintiff, a male, alleges that during the time of his employment, Sundowner failed to provide a suitable working environment because he was subjected on several occasions to verbal and physical harassment from one of his male supervisors, Lyons, and two of his co-workers, Pippin and Johnson, while working on the rig.

II.

SAME-SEX TITLE VII CLAIMS

Title VII of the Civil Rights Act of 1964, as amended, makes it "an unlawful employment practice for an *employer* . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin." 42 U.S.C. Sec. 2000e-2(a)(1) (emphasis added). In enacting Title VII, Congress intended to address the problems arising from disparate treatment of persons on the basis of their sex. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993). "Title VII is aimed at a gender-biased atmosphere; an atmosphere of oppression by a 'dominant' gender." *Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994). Faced with facts similar to those in the instant case, courts have rejected plaintiffs' claims of sexual harassment in a same-sex context. *See, e.g., Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135 (S.D. Tex. 1993). In *Goluszek*, the plaintiff alleged that he had been verbally harassed on numerous occasions by co-workers who made sexual references, and physically harassed plaintiff by poking him in the buttocks with a stick. *Id.* at 1453-54. Additionally, plaintiff complained that the employer had failed to correct the situation even after being informed of the problem. *Id.* The *Goluszek* court refused to expand the scope of Title VII liability to a form of conduct that was never contemplated by Congress when it enacted this legislation. *Id.* at 1456. Harassment by male supervisors against male subordinates, particularly in an exclusively

male environment, "is not the type of conduct Congress intended to sanction when it enacted Title VII". *Id.*

Title VII would be "strained beyond its manifest intent" if this court were to acknowledge a claim of sexual harassment where the alleged harasser and the alleged victim are both of the same gender. *Hopkins v. Baltimore Gas & Elec. Co.*, Civ. No. H-93-4167, 1994 U.S. Dist. LEXIS 18586 (D. Md. Dec. 28, 1994). Accordingly, this court should reject Plaintiff's claims as a matter of law and grant summary judgment as to all defendants.

II.

HOSTILE WORK ENVIRONMENT HARASSMENT

In his complaint, Plaintiff has failed to state what kind of Title VII sexual discrimination Sundowner, Lyons, Pippin and Johnson are alleged to have committed. There are two types of actionable sexual discrimination under Title VII: *quid pro quo* harassment and hostile work environment harassment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986). Although it is believed that Plaintiff's allegations sound only in hostile environment harassment, for the purposes of completeness both types of discrimination will be addressed.

A Plaintiff establishes a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. *Meritor* at 66. If a plaintiff alleges a hostile work environment, the critical inquiry for the courts is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed". *Harris*, 114 S.Ct. 367, 372 (1993) (Ginsburg, J.,

concurring); *accord*, Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. Sec. 1604.11 (1985) (concluding appropriate inquiry is whether harasser treats member of one sex differently than member of opposite sex).

The Fifth Circuit does not recognize same-sex harassment claims under Title VII. *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 (5th Cir. 1994). The allegations made by Plaintiff are similar to those made by the charging party in *Garcia*. Garcia alleged that he had been sexually harassed by a male supervisor at his place of employment. Several incidents of harassment were cited, including occasions where the supervisor had "reached around and grabbed [Garcia's] crotch area and made sexual motions from behind [Garcia]." *Garcia* at 448. The Fifth Circuit held that "harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Garcia* at 451-52 (citing *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. 1993) (unpublished).

Plaintiff alleges that he was physically and verbally harassed by Lyons, Pippin and Johnson on several occasions. Even assuming that these allegations are true, "Title VII does not make all forms of harassment actionable, nor does it even make all forms of verbal harassment with sexual overtones actionable." *Goluszek* at 1456. Even absent this controlling precedent, Plaintiff would fail to establish his prima facie case for a hostile working environment cause of action. The Fifth Circuit has adopted a five-part test to determine if a hostile working environment harassment claim exists: 1) plaintiff belongs

to a protected group; 2) plaintiff was subject to unwelcome sexual harassment; 3) the harassment complained of was based upon the plaintiff's sex; 4) the harassment complained of affected a "term, condition, or privilege" of employment; *and* (5) the plaintiff's employer knew or should have known of the harassment and failed to take remedial action. *Collins v. Baptist Memorial Geriatric Center*, 937 F.2d 190, 193 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 968, 117 L.Ed. 133 (1992).

It is the third element that mandates summary judgment in favor of Defendants – harassment on the basis of the charging party's sex. Plaintiff cannot show that, "but for his being male, he would not have been treated by his co-workers in the manner that he was." *Polly v. Houston Lighting & Power Co.*, 825 F.Supp. 135, 137 (S.D. Tex. 1993). Plaintiff has not and cannot allege facts which would support the notion that Sundowner, Lyons, Pippin and Johnson allowed and maintained a work environment that treats males as inferior, as opposed to the way it treats females. It cannot be disputed that only males were employed by Sundowner on the platform. *See* Exhibit "B", Affidavit of Ed DuBroc, Personnel Manager of Sundowner. Sundowner, Lyons, Pippin and Johnson did not create nor foster anti-male sentiment in the workplace. Plaintiff cannot show that he was singled out for different treatment on the basis of his sex.

III.

QUID PRO QUO SEXUAL HARASSMENT

The alternative type of harassment, *quid pro quo* sexual harassment, typically takes the form of a demand for

sexual favors, with the harasser being in a position to adversely affect the employee's working conditions if those demands are rejected. A charging party must prove the following: 1) that the employee belongs to a protected group; 2) the employee was subject to unwelcome sexual harassment; 3) the harassment complained of was based upon sex; 4) the employee's reaction to harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment, *and* (5) the employee's rejection or acceptance of the harassment must be an expressed or implied condition of the receipt of a job benefit or must cause tangible job detriment; and the employer knew or should have known of the harassment and failed to take remedial action. *Jones v. Flagship Int'l*, 793 F.2d 714, 719-20 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

Charging parties who are male have prevailed against male supervisors when it has been proven that the supervisor was homosexual and, thus, were able to prove that the harasser discriminated against the subordinate on the basis of his sex. *See, e.g., Joyner v. AAA Cooper Transp.*, 597 F.Supp. 537, 542 (N.D. Al. 1983) (finding *quid pro quo* sexual harassment where homosexual supervisor requested sex from male subordinate); *accord, Wright v. Methodist Youth Services, Inc.*, 511 F.Supp. 307 (N.D. Ill. 1981) (noting that same sex harassment is actionable if it is based on the victim's sex and the harasser does treat members of the opposite sex differently). Those cases are distinguishable from this case. Here, Plaintiff admitted to an EEOC investigator that he does not know or believe that Lyons, Pippin or Johnson are homosexuals. *See* EEOC Investigation Report, attached as Exhibit "A". Further,

Plaintiff does not allege that Lyons, Pippin or Johnson demanded that Plaintiff engage in any sexual acts, nor does Plaintiff allege that they linked any sexual demands to Plaintiff's job performance or threatened him with repercussions if he refused any demands made on the basis of his sex. Plaintiff's claim, if any, of *quid pro quo* sexual harassment must therefore fail.

IV.

DEFENDANTS PIPPIN AND JOHNSON

Liability under Title VII will attach to a plaintiff's employer, not mere co-workers. Agency principles extend liability to those individuals who have been delegated authority traditionally held by the employer. Typically, an employee can be held liable as an agent for the employer if that employee has the ability to direct work assignments, or can hire and fire. *Garcia* at 451. A co-worker who is not the employer's agent and has no supervisory responsibilities relative to a charging party cannot be held liable under Title VII. *Harvey v. Blake*, 913 F.2d 226, 228 (5th Cir. 1990).

Johnson was employed by Sundowner as a floorhand during Plaintiff's employment, and as such, had no authority to set Plaintiff's work schedule or priorities or to affect Plaintiff's employment status. *See* Exhibit "B". Pippin was employed by Sundowner as a driller throughout Plaintiff's employment. Under Sundowner's rig crew hierarchy, Pippin had no authority over Plaintiff. Both Johnson and Pippin were only Plaintiff's co-workers; they were not agents of Sundowner with any supervisory authority over Plaintiff. *See* Exhibit "B".

In his complaint, Plaintiff has charged both Johnson and Pippin with sexual discrimination and sexual harassment. It cannot be disputed that neither Johnson nor Pippin were acting as Plaintiff's 'employer'. Accordingly, summary judgment should be granted in favor of both Johnson and Pippin.

V.

CONCLUSION

Case law and 5th Circuit precedent are clear – when the plaintiff cannot prove that harassment was instigated on the basis of the plaintiff's sex, same-sex harassment is not actionable under Title VII. In this case, Plaintiff cannot prove the alleged incidents occurred solely because the Plaintiff was male, because there were no members of the opposite sex either employed by Sundowner or located on the offshore platform. Thus, Plaintiff cannot establish his prima facie case for either *quid pro quo* or hostile environment sexual harassment against Sundowner or Lyons because any discrimination and/or harassment which occurred could not have been perpetrated on the basis of sex. Johnson and Pippin, as mere co-workers, had no supervisory responsibility over the Plaintiff and, as such, are beyond the scope of Title VII liability. For these reasons, all defendants are entitled to summary judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56.

WHEREFORE, in consideration of the foregoing, Defendants Sundowner, Lyons, Pippin and Johnson request that this Court grant its Motion for Summary Judgment, and pray for such other and further relief,

both at law and in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

BROWN, PARKER & LEAHY, L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 1995, a true and correct copy of the above and foregoing instrument was served on all counsel of record as follows, in accordance with the Federal Rules of Civil Procedure, via U.S. Postal Service, postage pre-paid.

Andre LaPlace
2762 Continental Drive, Suite 103
Baton Rouge, LA 70808

/s/ Christopher M. Brown
Christopher M. Brown

EXHIBIT "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	C.A. NO. 94-1483
VERSUE	JUDGE: SECT. L (C); MAG. 4
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPIN, AND BRANDON JOHNSON,	MAGISTRATE: (C)

AFFIDAVIT OF EDWARD M. DUBROC

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared Edward M. DuBroc, who being first duly sworn, upon his oath deposed and said:

"My name is Edward M. DuBroc and I am the personnel director for Sundowner Services, Inc. ("Sundowner"). I am over the age of eighteen (18) years, of sound mind, have never been convicted of a felony, and am fully competent and duly authorized to make this affidavit. I have personal knowledge of all facts stated in this affidavit, and they are all true and correct.

"I have served as personnel director at Sundowner since February 1, 1993. My job responsibilities include, among other things, administering employment polices [sic] for Sundowner, maintaining employment files, and assuring qualified persons are hired for employment by Sundowner. Based on the records maintained by Sundowner, I have knowledge of all job descriptions and responsibilities of each person employed by Sundowner.

"Joseph Oncale was hired by Sundowner on October 7, 1991. Sundowner records indicate that he voluntary resigned from this position on November 10, 1991. He was employed by Sundowner as a roustabout. His direct supervisor on the rig would have been Johnny Lyons, crane operator.

"At the time of Mr. Oncale's employment, Danny Pippin was employed by Sundowner as a driller. The driller is the direct supervisor of derrick hands and/or floor hands. He is not the direct supervisor of the roustabouts. Mr. Pippin did not maintain supervisory control over Joseph Oncale during his period of employment with Sundowner.

"Brandon Johnson was employed as floor hand on the drilling crew during Mr. Oncale's employment. His direct supervisor was Danny Pippin. Mr. Johnson is not in a supervisory capacity and did not supervise Joseph Oncale at any time.

"Based on Sundowner's files and my own personal knowledge, no females were employed by Sundowner on any drilling or workover rig during the time of Mr. Oncale's employment.

Further Affiant sayeth not.

[Seal]

/s/ Edward M. DuBroc
EDWARD M. DUBROC

SUBSCRIBED AND SWORN TO BEFORE ME on this 31st day of January, 1995, to certify which witness my hand and seal of office.

[Seal]

/s/ Iwona J. Sears
Notary Public in and for
The State of Texas

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE

VERSUS

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON

C.A. NO. 94-1483

JUDGE: SECT. T MAG 4

MAGISTRATE: (C)

****

STATEMENT OF MATERIAL FACTS IN DISPUTE

Pursuant to Rule 2.10E of the Uniform District Court Rules, plaintiff Joseph Oncale asserts in opposition to the summary judgment motion brought by Sundowner Offshore Services, Inc., John Lyons, Danny Pippen and Brandon Johnson, that there exists genuine issues to be tried with regard to the following material facts:

1. The actions and statements of Danny Pippen when on October 25, 1991 he restrained Joseph Oncale to assist with and participate in a sexual assault upon Mr. Oncale by defendant John Lyons.

2. Danny Pippen's desires, thoughts and intent as he held Joseph Oncale on October 25, 1991 while John Lyons placed his penis on Joseph Oncale.

3. John Lyons exact actions and words on October 25, 1991 as he placed his penis on Joseph Oncale's neck.

4. John Lyons' desires and intent as he placed his penis on Joseph Oncale as Mr. Oncale was restrained by a co-employee on October 25, 1991.

5. Whether, and with what intent, John Lyons declared on October 25, 1991 that he intended and actively desired sexual intercourse with Joseph Oncale.

6. Whether, and with what intent or desire, Brandon Johnson grabbed Joseph Oncale on October 26, 1991 as Mr. Oncale was attempting to depart from a personnel basket.

7. Whether, and with what intent, John Lyons displayed his penis and placed it on Joseph Oncale's arm on October 26, 1991.

8. Whether, and with what intent, desire or motivation, Danny Pippen and John Lyons acted in concert during the evening hours of October 26, 1991 to grab Joseph Oncale while showering, forcing a bar a [sic] soap into his anus and stating that they wished to have homosexual sex with him.

9. Whether, and to what extent, Sundowner Offshore Services, Inc.'s Safety Compliance Clerk, Mr. Valent Hoen, Jr. and Sundowner's Toolpusher, Mr. Butch Edwards, were aware of and condoned the sexual assaults committed by supervisory personnel upon the plaintiff.

10. The extent to which John Lyons, Crane Operator, and, or Danny Pippen, Driller, supervised and controlled the terms, conditions and duration of Mr. Oncale's employment with Sundowner Offshore Services, Inc.

11. Whether, and to what extent, Danny Pippen, Driller, exercised supervisory authority over and, control over, Joseph L. Oncale.

12. Whether, and to what extent, John Lyons, continued his verbal assaults and promises of

homosexual rape of your claimant during the week ending November 10, 1994.

13. The supervisory personnel's, including safety compliance officer and toolpushers, knowledge of, and response to, the activities of the individual defendants.

14. The contents and enforcement of sexual discrimination policies by Sundowner Offshore and the factual basis for alleged respondeat superior liability.

15. The perceptions of Joseph Oncale that he must submit to sexual abuse as a condition of his employment and the reasonableness of those perceptions.

RESPECTFULLY SUBMITTED:

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Counsel for Joseph Oncale

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	
VERSUS	C.A. NO. 94-1483
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON	JUDGE: SECT. T MAG 4
	MAGISTRATE: (C)

PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

May it please the Court:

Your defendants, Sundowner Offshore Services, Inc. and three of its direct employees, invite this Court to summarily dismiss Joseph Oncale's sexual harassment action because, to quote the defendants' motion, "under established law . . . the discrimination and harassment of which Oncale, a male, complains is not actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, et seq." Given that every material fact, with the possible exception of the dates of Mr. Oncale's employment with Sundowner Offshore Services, Inc., are in dispute or are not susceptible to summary resolution and given, further, that the case law relied upon by the Defendants does not reflect an unqualified repudiation of male-on-male sexual harassment claims under Title VII of the Civil Rights Act, the Defendants' invitation should be refused and this matter should proceed towards trial.

Without consideration of the facts and circumstances surrounding the weeks of sexual terror and actual sexual

assault to which Joseph Oncale was subjected by the individual defendants, or the desires, intentions and motives of these individuals, the defendants seek summary dismissal. Without any discussion of the manner in which Sundowner's Director of Safety and its Toolpusher (Sundowner's highest ranking employees on the job site) stood idly by with full knowledge of the conduct of Lyons, Pippen and Johnson, Sundowner Offshore would have this Court find that no genuine issues of material fact exists and that, as a matter of law, Joseph Oncale is not entitled to proceed to trial.

Without reference to the fact that Joseph Oncale reasonably believed that submission to his direct supervisor's homosexual advances had become a condition of employment, sundowner would have this court conclude that no fact questions need be tried. The central thrust of the summary judgment argument is that under no circumstances can this Court allow recovery in this or any other "male-on-male" sexual harassment claim. There being no blanket prohibition in the law to recovery under Title VII by a male employee who is sexually harassed by other male employees who control the terms, conditions and duration of the victim's employment while a fully informed Safety Director and Toolpusher take no action, the motion for summary must fail and the claims must be tried.

To the extent that the defendants abandon their absolute argument, i.e., that there can never be a male victim, and assert that there are no unresolved facts material to the "quid pro quo" aspects of Mr. Oncale's action, the summary judgment motion falls under its own weight. Obviously there are many unresolved factual matters

inherent in the pending claims. These include: Are the individual defendants homosexual? Whether or not they are actual homosexuals (whatever this means?) did the individual defendants, who controlled the terms, conditions and duration of Mr. Oncale's chosen employment, demand, solicit or take homosexual favors from Joseph Oncale? Was submission to sexual advances an explicit or implicit condition of Mr. Oncale's employment? Were Mr. Oncale's beliefs that he was being forced to submit to sexual assaults as a condition of his employment reasonable under the circumstances? See, further, the factors listed in *Jones v. Flagship International*, 793 F.2d 714, 719-20 (5th Cir. 1986). Plainly, a claim so fact-specific and fact-dependent cannot be resolved through a summary judgment motion.

I. STATEMENT OF THE CASE

Mr. Oncale's claim arises out of a series of events that occurred during his employment with Sundowner Offshore Services between August and November of 1991. Primarily, Joseph Oncale asserts that he was denied his civil and employment rights in violation of law as he was sexually assaulted, battered, touched, and threatened with homosexual rape by his direct supervisor, John Lyons, with the assistance of a second supervisor, Danny Pippen, who, as a driller for Sundowner, exercised de facto control over the terms and conditions of Joseph Oncale's employment, The third individual defendant, Brandon Johnson, a roustabout, assisted John Lyons in one of the attacks. Mr. Oncale, who suffered several

direct, sexual assaults and innumerable threats of continuing sexual abuse and who twice reported the situation to his employer's highest ranking personnel on the job site, to no avail, was forced to quit his employment as he feared that were he to stay he "would be raped or forced to have sex." *Deposition of Joseph Oncale, page 64, pages 72-75, attached as Exhibit A hereto.* A detailed description of the vulgar and violent actions of the individual defendants and the circumstances under which Joseph Oncale reported the ongoing situation to his toolpusher and safety director is set forth in the affidavit completed by Mr. Oncale thought the E.E.O.C.; *which was marked and introduced by counsel for Sundowner as Exhibit One to the deposition of Joseph Oncale and is attached hereto as Exhibit B. See also the deposition of Brandon Johnson, pages 41-45, attached as Exhibit C in which he describes how John Lyons "said he was going to put his dick on (Oncale)" as he, Johnson, restrained Joseph Oncale.*

The testimony of Mr. Oncale, which mirrors the affidavit he submitted to the E.E.O.C., can be summarized further: Joseph Oncale will testify that his immediate supervisor, John Lyons, and another supervisor, Danny Pippen, who had de facto control over Mr. Oncale's employment, physically restrained him while John Lyons placed his penis on Mr. Oncale's arm on two occasion [sic] and violated him sexually when, on a third occasion John Lyons forced an object into Mr. Oncale's anus while Danny Pippen held Mr. Oncale. The supervisors repeatedly assured Mr. Oncale that they desired and intended sexual intercourse and that they would continue with their assaults as long as Mr. Oncale remained employed on the Sundowner rig; *see Oncale Deposition Exhibit A,*

pages 58-61. The Safety Director and Toolpusher; the "men in charge" for Sundowner did nothing to halt the repeated sexual threats and sexual battery. Instead, Mr. Lyons stated that Oncale's attempts to report the assaults would not bring an end to the ordeal; *see Oncale Deposition Exhibit A, pages 73-74.*

As testified to by Brandon Johnson, Joseph Oncale was not a lone [sic] or isolated victim of the sexual assaults committed by John Lyons, The testimony to be presented at trial will include the testimony of other victims of John Lyons and Mr. Johnson's description of how, several weeks prior to the assaults on Joseph Oncale, John Lyons, again with the assistance of the other individual defendants, held down a worker by the name of Kent Brumfield and "sucked a hickey on his neck." *Brandon Johnson Deposition, Exhibit C, pages 53-55, pages 75-77.*

The deposition testimony of Danny Pippen is that the actions complained of by Joseph Oncale do not constitute "horseplay" within the community of offshore laborers. Further, this witness testified that as a driller he had the authority to direct Mr. Oncale's work activities. *Deposition of Danny J. Pippen, attached as Exhibit D, pages 22-32.*

The events outlined by Joseph Oncale in his deposition testimony and affidavit to the E.E.O.C., the occurrence of which is accepted for purposes of this motion, establish an actionable claim for discrimination on the basis of sex. As the evidence establishes the homosexual proclivities of Joseph Oncale's direct supervisor and his direct and violent demands that Joseph Oncale submit to these advances as a condition of employment and the

inaction of the employer in the face of actual knowledge of the pattern of sexually-based harassment, the motion for summary judgment should be denied. See, generally, *Joyner v. AAA Cooper Transportation*, 597 F. Supp. 537 (M.D. AL. 1983).

II. SUMMARY JUDGMENT PRINCIPLES

(A) General Statement

It is well established that a defendant moving for summary judgment bears the burden of showing an absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. Substantive law determines the materiality of facts for summary judgment purposes. See, generally, *Kelly v. United States*, 805 F.Supp. 14 (E.D. LA. 1992). A fact is "material" for purposes of summary judgment analysis if it may affect the outcome of case. The dispute is "genuine" if trial is necessary to resolve evidentiary disagreements. The moving party bears the initial burden of showing that there is no genuine issue for trial. A dispute about a material fact is said to be "genuine" if the evidence would permit a reasonable jury to return a verdict for the non-moving party. See, generally, *Society of Financial Examiners v. National Association of Fraud*, 41 F.3d 223 (5th Cir. 1995).

Applying these standards to this case in which virtually every "fact" is in dispute requires the conclusion that summary judgment is inappropriate. The material facts about which there exists a genuine dispute include, but are not limited to, the manner in which the individual defendants battered and stated their desire to "fuck" Joseph Oncale and their state of mind or sexual stirrings

or desires as they did so. Further, the genuine facts in dispute include Joseph Oncale's perception of the sexual attacks and the basis and reasonableness of his belief is that the only way he could protect himself, given the inactions of supervisory personnel, was to abandon his employment.

When state of mind (or, in this case, sexual desire) is an element of a claim against a party moving for summary judgment, it is less fashionable to grant summary judgments since state of mind is inherently a question of fact which turns on credibility. See *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d. 1257 (5th Cir., 1991). Certainly, the Fifth Circuit has stated that a court is not precluded from granting summary judgment when state of mind is at issue. However, Louisiana's federal courts have emphasized that where intent and motive are relevant considerations in conjunction with an action and, therefore, a summary judgment motion, the court must be "vigilant to draw every reasonable inference from evidence in the record in the light most flattering to the nonmoving party." See, *International Shortstop, Inc.*, supra. See, also, *Bodenheimer v. P.P.G. Industries, Inc.*, 5 F.3rd 955 (5th Cir., 1993). With citation to the obviously inadmissible notes of the E.E.O.C. examiner who may or may not have recorded the statements of Joseph Oncale accurately, the defendants ask this court to resolve summarily all disputed questions of fact arising out of this claim and decide all questions concerning the motives, intentions and homosexual desires of the individual defendants in advance of trial. The court should reject this approach and allow the trier of fact to hear the claims.

(B) Inadmissibility of Evidence and Disputed Facts Relevant to Control and Liability

In support of their assertion that there are no material facts to be determined in conjunction with Joseph Oncale's quid pro quo sexual harassment claims, Sundowner states summarily, and incorrectly that "plaintiff does not allege that Lyons, Pippen or Johnson demanded that (he) engage in any sexual acts, nor does plaintiff allege that they linked any sexual demands to plaintiff's job performance or threaten him with repercussions if he refused any demand made upon him." Without citation to any indisputable facts which could possibly provide some foundation for these assertions, the entire factual fabric of Mr. Oncale's claim is simply disposed of by the defendants. It is submitted that this is not a proper approach a venue to a summary dismissal. The defendants' summary factual asserts [sic] are completely contrary to the deposition testimony of Joseph Oncale which was that he believed that he would have to endure the sexual assaults and attempted rapes if it was his desire to continue with his employment. These unresolved factual questions preclude an award of summary judgment.

Next, the defendants would pretermit trial of this claim by reference to the handwritten notes of an E.E.O.C. investigator, attached as Exhibit A to Sundowner's motion for summary judgment. As this exhibit is nothing more than an investigator's file notes, they constitute hearsay and, thus, are not admissible in support of this summary judgment motion. Federal Rule of Civil Procedure 56(e) will not allow sundowner's reliance on this inadmissible evidence. Plainly, the only relevance

of the document would be to prove the truth of the matters asserted therein. This is inadmissible hearsay evidence and, thus, cannot be weighed in favor of Sundowner's summary judgment motion.

Next, the defendants would have this court determine summarily the matter of Danny Pippen's right and power to exercise control over the terms and conditions of Mr. Oncale's employment. The movers attach an affidavit to the effect that, in accordance with Sundowner's hierarchy, Danny Pippen was not granted supervisory authority over Joseph Oncale's [sic]. Be this as it may, the deposition testimony of both Mr. Oncale and Mr. Pippen is that Mr. Pippen exercised de facto control over the conditions of Mr. Oncale's employment. For this further reason, summary judgment would be inappropriate on this issue.

III. APPLICABLE LAW AND ARGUMENT: Male-on-Male Hostile Environment Case Law

Joseph Oncale concedes, as he must, that few courts have directly explored or explained the rights of victims such as himself. Further, it is acknowledged that the Fifth Circuit Court of Appeals has gone out of its way to comment negatively upon "male-on-male" claims. In spite of this, summary judgment dismissing Mr. Oncale's action remains inappropriate for two reasons. First, a harassment claim is inherently a factual dispute and no court has ruled, as Sundowner would have this court rule, that the facts of a male-on-male claim are irrelevant and that, as a matter of law, all such claims must be

dismissed. Secondly, all of the cases relied upon by Sundowner can best be described as "horseplay" cases. None of the cases involved the touching and attempted homosexual intercourse involved in this dispute and none of the cases relied upon by Sundowner involved viable claims that the victim was being subjected to actual and threatened sexual abuse by a supervisor who controlled the terms and conditions of the victim's employment. These important distinguishing facts require that this action proceed to trial.

In *Polly v. Houston Lighting and Power Company,* 825 F.Supp. 135 (S.D. Tex. 1993) the court considered a sexual harassment claim brought by a male who alleged that during the course of his employment he was sexually harassed by other male employees with whom he worked as part of a traveling maintenance crew. The conduct complained of by Polly included the allegation that he was repeatedly called a "faggot," a "queer" and a "fat bucket of * * * ." Mr. Polly claimed that the defendants did, on one occasion, "expose their genitalia to him."

The district court, after full review of the facts, characterized the case as a "hostile environment claim." Further, it noted that the sexual behavior was perpetrated not by Polly's supervisors who had authority to affect tangible aspects of his compensation, terms, conditions, or privilege of employment but by co-employees who lacked authority. See *Polly* at pages 137, n.3 and 138. Further, the court found as a fact that the acts committed against Mr. Polly were not "in demanding sexual favors," but rather the acts committed were done with jealous or malicious intent. *Polly v. Houston Lighting and Power Company,* supra, at pages 138, n.4, 139.

Concluding that the case before it was only a hostile environment claim, and armed with the employee's admissions that the complained-of acts were committed out of jealousy or "horseplay," the court granted the employer's summary judgment motion and concluded that Mr. Polly could not maintain a cause of action for sexual harassment under Title VII. For present purposes, it is important to note two things: First, the court carefully reviewed the facts involved and the direct evidence of a lack of homosexual overtones. Secondly, the Court rules simply that Mr. Polly failed to advance sufficient facts in response to a summary judgment motion. The Court did not summarily dismiss the asserted cause of actions and cited approvingly the cases in which "male-on-male" claims were recognized. Further, the Court did not rule in favor of the employer in absolute terms, it did so on the facts.

Similarly, in the case of *Garcia v. Elf Autochem North America,* 28 F.3rd. 446 (5th Cir., 1994) the court was not presented with a sexual harassment claim brought by a worker who, like Joseph Oncale, was physically assaulted by an immediate supervisor under circumstances and with words that could reasonably be understood to evidence an actual desire to engage in a sexual act. Unlike Joseph Oncale, Mr. Garcia was not made to understand that the price of continued employment was submission to a male supervisor's violent sexual desires. Further, the determination in favor of the employer came only after full review of the facts.

The facts important to the *Garcia* case were that Mr. Garcia complained that a fellow worker, who was not Garcia's supervisor, *Garcia,* supra, at page 448, "made

sexual motions from behind Garcia." On the record presented, the Fifth Circuit affirmed the trial court's determination that Elf Autochem was not Mr. Garcia's employer for purposes of Title VII. It was on *this basis* that Elf Autochem was granted summary judgment. Further, the individual defendant, Locke, was dismissed from the claim because he was "a mere co-worker" who exercised no supervisory authority over Garcia. *Garcia*, supra, at page 451.

After finding that the trial court properly dismissed each of the corporate and individual defendants, the Fifth Circuit, in unnecessary dicta, concluded that "what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII." The importance of this approach for purposes of the summary judgment motion now before this court, is that this ruling shows that the Fifth Circuit was evaluating "what Locke did to Garcia," i.e. he stood behind the "victim" and made gestures. It seems that the Fifth Circuit's ruling, which came only after full review of the record, is simply that Title VII does not extent to "what Locke did to Garcia;" which can best be described as adolescent horseplay. The behavior of the individuals now before this court, by their own admissions, was not "simply horseplay." *Pippen Deposition Exhibit D; pages 22-32.*

The third case relied upon by Sundowner Offshore Services, Inc. in its summary judgment motion is the United States District Court for the State of Maryland's decision in the matter of *Hopkins v. Baltimore Gas and Electric Company*, ___ F. Supp. ___, 63 USWL [sic] 2420, (Md. 1994). The important background facts in *Hopkins* are that the plaintiff's sexual harassment suit was based

upon the following, limited facts: His immediate supervisor, the harasser, "made jokes and gestures of a sexual nature." Additionally, his supervisor sometimes said to him "you look so distinguished." Further, Mr. Hopkins complained that he was harassed because of the "strange look" which the supervisor had at times and because his supervisor allegedly said "something like orientation is subjective and gave him a peculiar look." On other occasions, the supervisor "made inquiries and comments" which plaintiff felt were embarrassing and "overly personal." *Hopkins*, supra, at pages 5-6.

The court in *Hopkins*, review the case law applicable to a Title VII sexual harassment claims [sic] and plainly characterized Mr. Hopkins' action as a "hostile work environment" claim. Thereafter the Court emphased [sic], first, that *"none of the alleged incidents of sexual harassment by (the individual defendant) involved implicit or explicit requests or demands for sexual favors." And, second, many of the incidents relied upon did not appear to have been "sexual in nature" and involved "essentially trivial conduct." And third, that the individual defendant never touched plaintiff in a sexual manner. Hopkins*, supra, at page 10. The court concluded that no reasonable jury could find on the record that the claimant was a victim of proscribed sexual harassment.

Again, this is a summary judgment determination that is far different than the one which Sundowner now asks this Court to make. The *Hopkins* court plainly did not dismiss the "male-on-male claim" simply as a matter of law. It reviewed all of the facts and found the claim to involve relatively trivial, non-sexual conduct. It further emphasized that the claim involved no implicit or explicit

demands for sexual favors. Mr. Hopkins, unlike Joseph Oncale, was not threatened with rape on some occasions and sexually touched on others while being assured that he could not escape this torment by reporting the abuse to supervisors. Mr. Hopkins, unlike Mr. Oncale, did not testify that he believed that he would be raped should he continue in his employment. The different fact patterns may well require a different result after trial. The *Hopkins* court's approach certainly requires that Mr. Oncale be allowed to proceed towards trial so that this court can fully consider the facts in the same manner they were considered in the cases Sundowner cites in support of its assertion that trial is unnecessary.

In short summary, careful review of the case law relied upon by Sundowner reveals first, every court dismissing a male-on-male sexual harassment claim did so after a thorough review of the facts. Sundowner, citing no facts, presenting no statement of uncontested facts, and citing none of the three depositions which have been taken, would have this court determine as a matter of law that a male could *never* sue successfully under sexual harassment theories. None of the cases stand for this proposition.

Secondly, two out of the three cases, *Polly* and *Garcia*, did not involve supervisory personnel who were clothed by the company with direct, actual authority to control the terms, conditions and duration of the victim's employment. The third case, *Hopkins* did not involve a supervisor who exploited his authority to sexually victimize the plaintiff. This is important as the cases cited in support of the summary judgment motion are based on the lack of these factors.

Lastly, none of the cases relied upon by mover are remotely similar to Mr. Oncale's claim that he was actually penetrated with a foreign object while being held by both a co-employee and a supervisor. None of the victims in the cited cases were assured by a direct supervisor, as Mr. Oncale was, that he would be a frequent victim of actual, sexual touching should he attempt to continue in his employment. Plainly, in all of the reported cases it was the absence of the facts now before this court that led to the denial of relief.

IV. QUID PRO QUO HARASSMENT: Tangible Employment Consequences

Under E.E.O.C. guidelines, actual harassment exists when, "submission to sexual conduct is made either explicitly or implicitly a term or condition of an individual's employment," or when "submission to or rejection of such conduct by an individual is used as a basis for employment decisions effecting such individual."

An actionable quid pro quo case does not require proof that the plaintiff's job was at stake. Less extreme adverse employment actions such as demotion or other disciplinary measures will suffice. See, generally, *Sowers v. Kemira, Inc.*, 701 F.Supp. 809 (S.D. GA. 1988).

For sexual harassment to be actionable under Title VII, the complained of conduct must be unwelcome and must affect a term of [sic] condition of employment. There are two types of sexual harassment claims recognized by the courts and the claimant does not necessarily assert one or the other with the presentation of his case. To the extent that Mr. Oncale's claim and the actions of

defendant are characterized by a loss of tangible economic benefits to the employee who rejected his supervisor sexual demands, it is a "quid pro quo" harassment case. The majority rule is that an employer is absolutely liable for acts of "quid pro quo" harassment by a supervisor who has plenary power to make employment decisions, and thus functions as a surrogate for the employer. See, generally, Larson *Employment Discrimination*, 2nd Edition, Section T41A.11.

Under the E.E.O.C. guidelines, 29 C.F.R. Section 1604.11, actionable harassment exists when "submission to [sexual] conduct is made either explicitly or implicitly a term or condition of an individual's employment or when "submission to or rejection to such conduct by an individual is used as a basis for employment decisions affecting such individual."

The E.E.O.C.'s guidelines, 29 C.F.R. 1604.11 provide that harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, and (2) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Sundowner concedes, as it must, that homosexual harassment violates Title VII. See, generally, *Joyner v. AAA Cooper Transport*, 597 F.Supp 537 (M.D. Ala. 1983). However, Sundowner then attempts to avoid the factual

questions inherent in this and all other quid pro quo cases, (i.e. what was said, what was the desire or intent of the supervisor involved, was the victim's perception that submission to the unwelcome sexual assault was implicitly, if not explicitly, a condition of continued employment reasonable, etc.) with two self-serving propositions. First, Sundowner asserts that inadmissible and unreliable note [sic] of an E.E.O.C. examiner resolves all questions of fact in favor of Sundowner so that the direct testimony of Joseph Oncale that he actually believed that he would be raped by his superior if he were to continue in his employment can be ignored. Second, Sundowner argues that the reported cases are distinguishable because the supervisors in those cases were "actual homosexuals" (however this was determined) as opposed to non-homosexuals (such as John Lyons?) who threaten homosexual sex and appeared to enjoy their violent, sexual assault upon another male. These assertions and the summary judgment motion which rests upon them must be rejected.

Whether John Lyons and the other individual defendants are homosexuals or heterosexuals who chose to homosexually violate Joseph Oncale is a fact question for this court to consider at trial. But this question is not determinative of the case. Sundowner seems to assert that summary judgment is proper because it has "proven" that its supervisors are not homosexual. This is not a proper matter for summary determination. Further, under what facts or legal theory is Joseph Oncale precluded form introducing evidence of the defendant's conduct and his perceptions of that conduct? How does one "prove" that another is or is not a homosexual other than

by presenting to the trier of fact all the details of the individual's conduct? The summary judgment argument advanced by Sundowner begs the central question: Is the issue whether the individual defendant's were "actual homosexuals" (whatever this means) as they attempted to penetrate Joseph Oncale and assisted each other in their efforts to touch Mr. Oncale with their penises, or is the issue whether under all of the facts Joseph Oncale reasonably perceived that the advances were based on sex and would have to be endured if he wished to continue in his employment with Sundowner?

In *Joyner*, supra, at 538, the limited facts were that a manager allegedly placed his hands on plaintiff's "private parts" and asked the plaintiff to engage in homosexual activities. The plaintiff refused and walked away. The plaintiff reported the incident.

Granting relief for the plaintiff, the court did not base its rulings on a factual determination that the victim's manager was, in fact, a homosexual. Instead, the court found that Mr. Joyner had satisfied the elements of quid pro quo harassment set forth in *Henson v. City of Dunee*, 682 F.2d 897 (11th Cir. 1982) when he established (1) that he was a male, i.e. a member of a protected class, (2) that he was subjected to unwelcomed sexual harassment and, (3) "since the evidence established the terminal manager's homosexual proclivities," the harassment of which Mr. Joyner complained was based upon sex. The court also found that the plaintiff satisfied the fourth element as the evidence was sufficient to show that Mr. Joyner's rejection of the homosexual overtures ultimately caused a tangible job detriment. Under law, therefore, the facts which must be tried in this case, and which cannot be

resolved summarily, include the nature and extent of the individual defendants' homosexual proclivities, the possible manifestations of these proclivities by the supervisors, the nature of the harassment to which Joseph Oncale was subjected, and whether the actions of the defendants reflected "homosexual overtures" which Joseph Oncale avoided only by resigning his employment. Mr. Oncale's claims cannot be dismissed, as Sundowner would have this court dismiss them, because the other cases, such as *Joyner*, "involved real homosexuals." Such analysis hinges upon factual questions which must be tried.

V. SUMMARY

Joseph Oncale advances a claim to recover for the sexual harassment he endured during the term of his employment with Sundowner Offshore Services, Inc. As a claim of this nature is inherently factual and must involve a comprehensive evaluation of the abuse to which Mr. Oncale's [sic] was subjected and an evaluation of his reasonable perceptions and responses to that abuse, see, generally, *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), this motion for summary judgment should be dismissed in all respects. With regard to John Lyons, it is apparently conceded by Sundowner that Mr. Lyons exercised supervisory authority and control over Mr. Oncale. However, there is a dispute as to relevant facts with regard to Danny Pippen's power and authority over Joseph Oncale. With regard to Brandon Johnson, an unresolved factual question would be whether, and to what extent, this fellow worker conspired with the supervisors

to deprive Mr. Oncale of his right to a peaceful employment relationship and whether this conspiracy, if one exists, would allow for liability under law.

While Sundowner can cite some cases which show that the courts examine "male-on-male" claims vary carefully, none of these decisions announce a bright line rule that under no circumstances can a male advance successfully a claim under Title VII of the Civil Rights Act. Certainly, this is not true (as Sundowner appears to acknowledge) in quid pro quo cases.

Joseph Oncale was sexually assaulted, sexually touched and, in the process thereof, denied tangible benefits of his employment by direct supervisors who implicitly and explicitly conditioned Mr. Oncale's employment rights upon his willingness to submit to the manifestations of their violent sexual desires. Seeking a summary dismissal, the Employer essentially says two things: None of the facts matter because a male can never recover under Title VII, or, alternatively, to the extent a man might be able to recover, Mr. Oncale cannot, because no one involved was "a homosexual." These assertions, it is respectfully submitted, mischaracterize applicable law and are dependent upon factual determinations which must be made at trial. The summary judgment motion should be denied.

RESPECTFULLY SUBMITTED:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	**C.A. NO. 94-1483**
VERSUS	**JUDGE: SECT. T. MAG 4**
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON	**MAGISTRATE: (C)**

****

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that Plaintiff's Opposition to Motion for Summary Judgment has been mailed, first class postage prepaid and properly addressed to all counsel of record on February 27, 1995. Further, undersigned counsel certifies that the referenced pleadings were sent, via Airborne Express for delivery on March 1, 1995 to both the Clerk of Court and the presiding Judge.

Baton Rouge, Louisiana this 1st day of March, 1995.

/s/ Nicholas Canaday, III
NICHOLAS CANADAY, III

/s/ Andre P. LaPlace
ANDRE P. LAPLACE

ONCALE EXHIBIT "A"

[p. 1] UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	CIVIL ACTION
VS.	NO. 904-1483
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN AND BRANDON JOHNSON	SECTION "L"
	MAG. 4
	MAGISTRATE (C)

Deposition of JOSEPH LAUREN ONCALE, given in the above-entitled cause, pursuant to the following stipulation, before Sandra P. DiFebbo, Certified Court Reporter, at the offices of Galloway, Johnson, Tompkins & Burr, 40th Floor, One Shell Square, New Orleans, Louisiana, on the 20th day of January, 1995.

* * *

[p. 58] A He could have been.

Q Do you recall him actually being there?

A No, sir.

Q Butch Edwards wasn't there, was he?

A No, sir. Butch Edwards stayed on the –

Q How about Danny Pippin, was he there?

A I don't think so.

Q What was the next incident of offensive touching?

A The shower.

Q Was that the same night?

A Yes, sir.

Q So going from the chronology, at least as we see it in the affidavit, that would have been the evening of October 26th?

A Yes, sir.

Q Tell me what happened.

A I was taking a shower when John Lyons and Danny Pippin jumped in the shower with me. Danny Pippin grabbed me, and John Lyons rubbed a bar of soap between the crack of my ass and told me, "Yeah, we know you talked to daddy about it, but we're going to fuck you anyway."

Q How big is that shower?

[p. 59] A I'd say it's three by three.

Q You said they jumped into the shower, or, I mean, did they like run in, or what happened?

A Surprisingly.

Q Was the curtain drawn?

A Oh, yes, sir.

Q And then what? Did they push the curtain back and run in?

A Yes, sir. Well, they didn't particularly push me, you know, push the curtain back. You can just walk through the curtain, you know, actually.

Q Again, Danny grabbed you; is that your testimony?

A Yes, sir.

Q How did he grab you?

A He grabbed me around my upper body, picking me up, and he wrapped his arms around my knees, the back of my knees where they would bend, and he kind of folded me.

Q So he lifted you completely off the ground?

A Yes, sir.

Q How much did you weigh at the time?

A About 125, 135, maintain.

[p. 60] Q So all three of you were in the shower. Mr. Pippin lifted you up off the ground. Then what happened?

A John Lyons grabs the bar of soap and rubbed it between the cheeks of my ass and tells me, you know, they're fixing to fuck me, you know, and –

Q Then what happened?

A Well, man, I struggled. I got away. I pushed Danny out of the shower. I pushed one of them out of the shower, and the other one got out. He seen that I was extremely mad.

Q Then what happened?

A I got the hell away from them, got dressed, and got away from them.

Q Did they just leave you alone at that point?

A That night.

Q I mean, what happened? Did they just stay in the shower and you ran out? What happened?

A They were still in the shower area when I got out.

Q Was there anybody else in the bathroom area [p. 61] at that time?

A There were several other people that seen it.

Q Who saw it?

A Pretty much everyone that was on our crew.

Q Was the whole crew in the bathroom, or were they out in their bunk room?

A They were in their bunk room.

Q So they didn't actually see it?

A The bunk meets right with the door. When you sit on your bunk, you can see everything that goes on.

Q Has anyone told you they actually saw what happened?

A Yes, sir.

Q Who?

A Bobby Guidry.

Q Anybody else?

A Jody Fontenot and Mark Robinson. They're the only ones that came to me and said, "Damn man."

Q When is the first time you complained to Mr. Lyons' supervisor that he was treating you improperly?

A Supervisor, meaning Butch?

* * *

[p. 64] Lyons' motivation, in your mind?

A To have sex with me, to rape me.

Q What happened after the shower incident?

A I stayed away from them.

Q Did you go to sleep that night? Is that pretty much the next thing that happened?

A I got very little sleep.

Q Did you go get in your bunk, and that was pretty much the end of it?

A That night, no. I did not get in the bunk after that happened. I got up. Well, I got out and got away from them, went downstairs. I just stayed away from them. I didn't like being around them. They scared me.

Q Do you know what day you terminated your employment with the Sundowner?

A I'm not exactly sure.

Q If some documents were saying it was around November 10th, do you have any reason to dispute that?

A No, sir. I figured it was around November.

Q Give me a time sequence as far as your work schedule was concerned after the shower incident. How many more days were you on

* * *

[p. 72] You can answer now.

THE WITNESS: As much as I can remember, yeah, I've told you, you know.

BY MR. BROWN:

Q Everything you can remember?

A At this time, you know.

MR. BROWN: I think that's all the questions I have.

EXAMINATION BY MR. LaPLACE:

Q Mr. Oncale, from your perspective, what did you believe Mr. Lyons' intentions were towards you?

A To rape me.

Q From your perspective, in your mind, what was Mr. Pippin's intentions towards you?

A To assist and/or help, you know, rape me, too.

Q In your mind, from your perspective, what was Mr. Johnson's intentions towards you?

A I think he plotted with John Lyons to do what they done to me.

Q Mr. Oncale, after checking a couple of notes on the break, and I appreciate [p. 73] counsel having a break, can you just tell – because it's unclear from the way you responded to Mr. Brown. Can you tell me why you left your job at Sundowner?

A I felt that if I didn't leave my job, that I would be raped or forced to have sex.

Q With who?

A Lyons and Pippin.

Q So in response to the questions that Mr. Brown asked you about did they ever tell you specifically you better have sex because we're going to fire you, that didn't occur?

A I felt that if I didn't get off the rig, that I would be sexually violated.

Q By your superiors?

A Exactly. John Lyons and Danny Pippin.

Q As I appreciate the scenario, from your work schedule, is that after this last week in October, when these three incidents, physical incidents, took place, you went home for seven days, and then you came back for seven days more, didn't you?

A Six days. I figured they would be reprimanded, fired, do something to these [p. 74] guys. They never did. And I felt that I was still being sexually harassed by the verbal abuse they was – I don't know how to put it to tell you. They were making sexual advances toward me verbally, and I felt that nothing had changed.

Q Predominately, who made verbal sexual suggestions to you?

A John Lyons.

Q Can you give us some examples of what he said to you on your last tour? By your own testimony, no physical touching took place. What did he say to you?

A "You tol[illegible] your daddy, huh? Well, it ain't going to do you no good because I'm going to fuck you anyway."

Q Did you know what the reference to "your daddy" meant?

A Yes, sir, I knew what it meant.

Q Tell us, for the record.

A It means the toolpusher.

Q Did you have any conversations with Val Hohen that last week of your work with Sundowner regarding these verbal suggestions Mr. Lyons was making?

[p. 75] A I asked him what had been done.

Q And his response was?

A That they were going to work on it. And I told Val, I said, "No, you know, ya'll got to do something."

Q Well, in your mind, did you quit over some kind of hassle with the smoking procedures on the rig?

A No, sir.

MR. LaPLACE: That's all I've got.

BY MR. BROWN:

Q I forgot to ask one question. What benefits did you have while working with Sundowner as far as health benefits or anything like that?

A If I'm not mistaken, some kind of medical insurance.

Q Was there a 90-day probationary period for that?

A Yes, sir, I think so, but I'm not for sure if it had kicked in or not, but that's what was offered, you know.

Q Other than medical benefits, do you know personally, as you sit here today, of any

* * *

ONCALE EXHIBIT "B"

STATE OF LA CASE NAME Oncale

CITY/COUNTY OF _____ CASE NUMBER 270920368

AFFIDAVIT

I, Joseph L. Oncale (Name) being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 21 years of age, my gender is Male (sex) and my racial identity is White (race).

I reside at 23350 DEMON WATSON ROAD (Number/Street)

City of MT. HERMAN, County of WASHINGTON,

State of LA, Zip Code 70450.

My telephone number is *(including area code)* (504) 839-3842.

My complaint is against SUNDOWNER OFFSHORE SERVICES, INC. which is (Name of Union/Company/Agency)

located at 2707 NORTH LOOP WEST, SUITE 510 (Number/Street)

in HOUSTON (City) TX (State) 77008 (Zip)

My job classification is *(if applicable)* ROUSTABOUT. (job title)

My immediate supervisor is *(if applicable)* John Lyons, (Name)

Crane Operator (job title)

I was employed by Sundowner Offshore Services, Inc. in about August of 1991. I worked as a Roustabout and earned $7.00 per hour. Sundowner Offshore Services, Inc. works over old wells, putting new pipe in the hole, clean out the wells and do various other duties as required by the clients for which Sundowner does contract work. I was hired through Sundowner's Houma, LA office and worked on Ship Shoal 266-A platform for Chevron, USA.

Almost upon my being hired, I was verbally abused by John Lyons, crane operator for Sundowner. He would call me an SOB and would curse me using other words. He cursed the other two Sundowner Roustabouts also. They were Jody Fontenot and Bobby Guidry.

I worked seven days on the platform and seven days off. We worked on platform A and slept on platform B. On or about October 25, 1991, my crew which consisted of Danny Pippen, driller; Brandon Johnson, Roughneck; Mark (LNU), derrick hand; another Roughneck named Dave (LNU); Lyons; Guidry; Fontenot and me were on our way to platform B by boat. Danny Pippen grabbed me holding my arms down and where I couldn't get away from him and Lyons put his penis in the back of my head. It was out of his pants. I was turning my head to see what was going on and I could see what he was doing. Everyone else on the crew saw this. He said that he was going to "fuck me in my behind". I kept struggling and finally got loose and asked him to please quit. He stopped at that point. The very next day, when we had left platform A and were at B, we had just been picked up by the personnel basket that the crane uses to pick personnel up off the boat and place on the platform. Before I could do anything, Brandon Johnson grabbed me and was squeezing me and holding me where I couldn't move. Before he could let me go, Lyons took his penis back out and put it on my arm. The very same night while I was taking a shower, Danny Pippen and John Lyons got in the shower with me, Danny grabbed me to where I couldn't move and Lyons rubbed the bar of soap between the cheeks of my behind and told me that they were going to "fuck me in my behind". I threw Danny out of the shower and

Lyons got out. They asked me "What's wrong, you don't want us taking a shower with us?"

I talked to Valent Hohen, Jr. who is the Safety Compliance Clerk for Sundowner. I talked to him immediately after the first incident. He told me that they picked him all the time too and called him, "Valene, Valene the Rig Queen" but he didn't take any other actions. This would have also been considered horseplay which is considered a reason for immediate termination.

Danny and John Lyons are both considered supervisors. Danny is the supervisor over the crane operator and all below him. He should have reported it to the Toolpusher but he was in on it. The Toolpusher is Butch Edwards. Most of the time, he stayed on platform A. He never went to B platform.

On November 10, 1991, I got so fed up, I couldn't sleep because I was afraid that they would do something to me, I couldn't fight, and I felt disgraced. On this day, we were working on a mud shaker electric motor. The toolpusher told me to clean the breaker and put it back in. I finished doing what he had told me to do. I looked to where Lyons and the other two roustabouts were working on the motor. They were in each other's way because the motor was so small. I went to smoke a cigarette. When I got back. Lyons asked me if I had gone to smoke a "fucking cigarette". I told him that I had and that there wasn't enough room for me to work with them and I was finished with what the Toolpusher had told me to do He told me never to do anything, use the

Text Continued on Attached Sheet(s)

I have read and had an opportunity to correct this Affidavit consisting of 4 handwritten ___ typed X pages and swear that these facts are true and correct to the best of my knowledge and belief.

/s/ Jody L. Oncale
SIGNATURE

Subscribed and sworn to before me

this 5th day of December 1991 .

/s/ Frances M. Watson
(504) 589-6034

Dec 5 13:08 1991 CP Initials SLD Chg #270920368, Attachment Page 1

Equal Employment Opportunity Commission
Affidavit, Additional Text

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bathroom, nothing without asking him permission. He told me to go to the SCR room (I'm not sure what that stands for but it's a room where we switch the generators and all the electrical equipment gets its power) and turn on a breaker that went to the mud motor. I turned to ask him which breaker and he told me that he didn't ask me all that "shit" that he had just told me to turn on the "goddam" breaker. I didn't know which breaker it was. I turned to ask him the same question. Before I could get the whole question out of my mouth, he told me the same thing and called me a stupid "sob". I asked him why he had to talk to me like that. At this time, I was very angry. I asked him why he couldn't talk to me nicely and he repeated what he had said before. I told him that if he

couldn't talk to me like I was a human being, I wouldn't do anything for him. He then said that he would "run my ass" off because he couldn't put up with a "smartass". I told him that the only "smartass" out there was him. He said that he was going to run me off and I told him that I quit.

I went to the Toolpusher and told him everything. He asked me if I could just hang on until the end of crew change which was the next day and on the next hitch he would put me on the opposite crew. I told him that I would try but I wanted him to keep me away from Lyons because I couldn't handle it anymore and felt like I was going crazy. I felt that if he did or said anything to me, I would hit him. He said that he would talk to Lyons and that there were three other crane operators in the yard and if he didn't straighten up, he would put him in the yard. I went downstairs and he called Lyons up and talked to him. When Lyons came down, he never said anything to me but talked to the other two roustabouts and told them that I wouldn't make it to the next crew change, that anything I did, he was going to run me off. He went to the galley and when Jody Fontenat told me this, I knew that if I didn't quit under the circumstances that had happened, they would say that I was only saying that I was sexually harassed because I was run off.

I went back to the toolpusher's office and told him that I wanted my pink slip and that I wanted it stated on there exactly the reasons for me quitting. He said okay and told me to tell Hohen to fill out my pink slip and get ready to do. I told Hohen and he filled out my pink slip saying that I voluntarily left due to sexual harassment and verbal abuse.

I left platform A and when I got to B, the toolpusher called me and said that the pink slip was no good and to give it back to Hohen because he didn't sign it. I told him that I wouldn't give it back because it was the only proof that I had. I told him that I would give it back when he gave me another pink slip signed by him saying the same reasons that I had quit, I would give it back. The next morning at 7:45 am, Hohen called me at home and asked me if there was any way that I would drop the sexual harassment part from the pink slip and keep the verbal abuse because a lot of people were going to get in trouble and some were going to lose their jobs and they were also going to loose [sic] their five year contract with Chevron if this went anywhere. I told him that I wanted the same thing on a second pink slip that I had on the first one before I would tear the first one up. He just said "Bye" and slammed the phone down.

Danny Pippen had kissed a galleyhand for Sundowner (Name Unknown) and he told Ben (LNU) who works for Chevron, USA as the company man. As company man, he is in charge of everything that goes on on the platform. This happened about the 7th or 8th of November, 1991. I was in the office when the galleyhand came in to complain. He also complained about Lyons telling him that he "loved him" and wanted to "fuck him in his butt". The next morning, in the safety meeting, he told Lyons and Pippen not to mess with the galleyhand anymore, that he was new, he was green to the field and he didn't know how it was offshore. That's all he said.

ONCALE EXHIBIT "C"

[p. 1] UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	CIVIL ACTION
VS.	NO. 904-1483
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN AND BRANDON JOHNSON	SECTION "L"
	MAG. 4
	MAGISTRATE (C)

Deposition of BRANDON JEFFERY JOHNSON, given in the above-entitled cause, pursuant to the following stipulation, before Sandra P. DiFebbo, Certified Court Reporter, at the offices of Galloway, Johnson, Tompkins & Burr, 40th Floor, One Shell Square, New Orleans, Louisiana, on the 20th day of January, 1995.

* * *

[p. 41] THE WITNESS: What is the question? I don't remember.

MR. LAPLACE: Read back to him.

(Court reporter read back.)

THE WITNESS: What do you mean by harassment?

BY MR. LaPLACE:

Q Okay. I'll start right there then. Did you ever hear Mr. Pippin or Mr. Lyons use profanity directed towards Mr. Oncale?

A They cussed him, cussed me, you know.

Q I'm sorry, sir?

A I've heard it towards him and towards others, too, towards me.

Q Tell me what you heard toward him, sir, by Mr. Pippin and Mr. Lyons.

A Verbatim? I don't remember word for word. That's just how they – you talk out there.

Q Well, give me some examples, sir.

A Saying – like he would call him – we called him Termite, you know.

Q You called him Termite?

[p. 42] A Just about everybody on the crew.

Q Well, why did you call him Termite?

A That's what we all called him.

Q Well, do you know where that name originated? Who started using it?

A I don't recall that.

Q Well, how did you know to call him Termite?

A I would hear other people call him that.

Q Well, did you ever witness Mr. Lyons, in his interaction with Mr. Oncale, pull his penis out and put it on his head or arm?

A No, sir.

Q You didn't hold Mr. Oncale down when Mr. Lyons put his dick on him?

A No. I grabbed him and pulled him off the personnel basket, about two foot. And I held him right there, and he never pulled it out. He said he was going to, and I told him, when I let him go, I would never let anybody do that to anybody.

Q Well, let's talk about that. When did this occur, to the best of your knowledge, this incident about the personnel basket and somebody's going to pull their dick out?

A I don't remember any dicks or anything.

[p. 43] Q Who was present besides yourself and Mr. Oncale?

A I don't remember.

Q Who was the guy who was supposed to pull his dick out?

A John Lyons.

Q Did Mr. Lyons ever have a habit of threatening to pull his dick out on people while working offshore on the rig?

A No.

Q You never heard him say he was going to put his dick on somebody?

A No.

Q Had you ever heard him tell other employees that he wanted to fuck them?

A No.

Q You were never personally present when any of that took place?

A None of what you just said, no.

Q Well, Mr. Oncale has filed a suit against you individually for being present when he was being held, and alleges Mr. Lyons took his penis out of his pants and laid his penis upon Mr. Oncale's body. You say that didn't occur?

[p. 44] A That did not occur.

Q Mr. Oncale is incorrect?

A That's correct.

Q Why don't you tell me your version of what happened in this incident, although you don't recall the exact date, what happened with the personnel basket. Tell my how it started.

A They left you off the boat with – he was coming down onto the platform. I was there. They left the boat. We was all bullshitting. He was hollering. He got about two or three feet off the deck, and I picked him up, grabbed him, took him off of it, and I was holding him. And then John said he was going to – to hold him there, I'll put my dick on him. And John walked toward him. I let him go, and I told him I wouldn't let anybody put – do anything – do that to anyone.

Q Well, is that the first time you ever heard Lyons say he was going to put his dick on somebody?

A Yeah. That was the only time.

Q You never did see him do that to anybody [p. 45] else in the crew?

A No.

Q You never heard him threaten to do it?

A No.

Q Did you ever see Mr. Lyons put his hands in his pants like he was going – and massaging his genitalia and pull it out to show it, put it in somebody's face?

A Put what in somebody's face?

Q His hand, after putting – after rubbing himself and put it in somebody's face saying, "This is what it smells like. You want to know what it's going to feel like shortly?" You never heard him say that?

A No.

Q You never saw him do it?

A No.

Q Now, you said that ya'll were on the deck bullshitting around, and that Mr. Oncale was hollering. What was he hollering about?

A We was all off tour. We always – we was at the platform, and he messed with us, he was messing with us, with everybody. We all messed around, you know, on our way

• • •

[p. 53] A No.

Q Are you aware of an incident where Mr. Brumfield was held down and hickeys were placed on his neck?

A I was aware of that.

Q Were you present when that occurred?

A Yes.

Q Please describe what occurred.

A They was – just held him down, and they put hickeys on him.

Q Who were the persons holding Mr. Brumfield down?

A John Lyons.

Q What about Danny Pippin, wasn't he there, also?

A We was all in the same room. We all slept in the same room together.

Q Did you help hold Mr. Brumfield down?

A I might have.

Q What was the purpose of restraining Mr. Brumfield?

A He was going – he was going in to get married that week, and –

Q And?

A And just another way of messing with [p. 54] somebody.

Q You mean as opposed to putting – someone putting their dick on you, they'd also put a hickey on your neck as another way of messing with you?

A No. Ain't nobody put their dick on nobody.

Q To the best of your knowledge?

A To the best of my knowledge.

Q You never actually saw that occur; is that correct?

A That's correct.

MR. BROWN: Asked and answered.

BY MR. LaPLACE:

Q So who applied the hickey to Mr. Brumfield's neck?

A John, I think.

Q How did he do that?

A Sucking on it.

Q So how many people did it take to hold Mr. Brumfield down while Mr. Lyons sucked on his neck?

A I don't remember.

Q More than one?

A One, two.

[p. 55] Q And you were one of these people, right?

A I could have been holding his feet. It's been so long back.

Q Was Mr. Brumfield enjoying himself?

A No.

Q As a matter of fact, he was quite upset about it, wasn't he?

A Then he started laughing about it.

Q In the time Mr. Brumfield was physically being restrained, and Mr. Lyons was sucking on his neck, he was not laughing, was he, sir?

A No, sir.

Q In fact, he was screaming to be let go, was he not, sir?

A I don't remember any screaming.

Q He was demanding to be let go; is that not correct?

A That is correct.

Q Why didn't you let him go?

A I let go.

Q After the hickey was on his neck?

A When he started screaming, hollering, I turned around and walked away. I was still in the same room.

* * *

[p. 75] Q So you don't know if he ever made any complaint to Sundowner personnel about being physically harassed in a sexual nature?

A No.

Q Do you consider holding a man down and restraining his movements while somebody else sucks on his neck a physical assault?

MR. BROWN: I object to the form. It calls for a legal conclusion and calls for testimony in an area of which proper predicate has not been laid as to this witness. You can answer it.

THE WITNESS: I don't really know what you were saying again.

BY MR. LaPLACE:

Q Do you consider fellows restraining someone against their will when their neck is getting sucked on a physical assault?

MR. BROWN: Same objection.

THE WITNESS: Oh, that's – you would have [p. 76] to be out there, you know.

BY MR. LaPLACE:

Q Well, I'm out there right now. If I jump on you, hold you down, and this man sucks on your neck, is that going to be a physical assault to you, sir?

MR. BROWN: Objection.

THE WITNESS: Strangers?

BY MR. LaPLACE:

Q Period, sir, the activity.

A Yes.

Q That's a physical assault, isn't it?

A Yes.

Q Just like Mr. Brumfield was a physical assault. He didn't give you permission to hold him down, did he?

A No.

Q He didn't give you permission to suck on his neck, did he?

A No.

Q He didn't like it, did he?

A No.

Q But you participated in it anyway, didn't [p. 77] you?

A Yes.

Q After Mr. Oncale left the employment of Sundowner, you know he filed a complaint with the EEOC?

A Who?

Q Mr. Oncale.

A No.

Q Have you ever been asked to give a written statement as to your version of the facts that happened at Mr. Oncale's employment working offshore for Sundowner?

A No.

Q Did you ever give any affidavits to the EEOC regarding his allegations against you for sexual harassment?

A No.

Q Did Sundowner come to you after Mr. Oncale filed his complaint with the EEOC and ask you to give a written statement?

A No.

Q Was there any inquiry or investigation by Sundowner Services after Mr. Oncale left as to the nature of why he left?

A Not to my knowledge.

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ONCALE EXHIBIT "D"

[p. 1] UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	CIVIL ACTION
VS.	NO. 904-1483
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN AND BRANDON JOHNSON	SECTION "L"
	MAG. 4
	MAGISTRATE (C)

Deposition of DANNY JOE PIPPIN, given in the above-entitled cause, pursuant to the following stipulation, before Sandra P. DiFebbo, Certified Court Reporter, at the offices of Galloway, Johnson, Tompkins & Burr, 40th Floor, One Shell Square, New Orleans, Louisiana, on the 20th day of January, 1995.

* * *

[p. 22] Q And he was transferred to another Sundowner operation?

A Yes, sir.

Q Is he still employed by Sundowner?

A No, sir.

Q Do you know where he is employed today?

A No, sir.

Q Have you seen him recently?

A No, sir.

Q Have you seen him since he left Sundowner?

A No, sir.

Q So, as I appreciate it, you worked on the same crew and you bunked in the same bunk room; is that correct?

A Yes, sir.

Q And you were both supervisors of your own portion of the Sundowner crew?

A Yes, sir.

Q Did you ever see Mr. Lyons take his dick out of his pants and put it on any co-workers?

A No, sir.

Q Mr. Oncale alleges that on a boat trip out to 266-A, in October of 1991, you physically restrained him

while John Lyons [p. 23] put his dick on the back of his head. Did that incident take place, sir?

A No, sir.

Q Have you ever physically restrained Jody Oncale?

A No, sir.

Q Never at all?

A Never.

Q Didn't put your hands on Jody Oncale?

A Yes.

Q Please describe that touching you had with Mr. Oncale.

A I grabbed him on his butt occasionally.

Q And why was that?

A Walk by, just goose him a little bit.

Q What was the motivation for doing that?

A None, really.

Q So it's your testimony that you have never seen Mr. Lyons remove his penis from his pants and place it on a Sundowner employee's body?

A No, sir.

Q From the time you worked with him?

A No, sir.

Q So you've never seen it; is that correct?

[p. 24] A That's correct.

Q Have you heard him making verbal statements to employees regarding I'm going to fuck you or I'm going to get you?

A No, sir.

Q You never heard him say it?

A No, sir.

Q You've never worked in concert with him to physically restrain or touch other Sundowner employees?

A No, sir.

Q Did you ever see him intimate to any galley hand that he was going to fuck them?

A No, sir.

Q Have you ever heard him say that?

A No, sir.

Q Ever see him reach down and rub his crotch in front of other Sundowner employees and say he was going to whip it out and show them what it looked like?

A Not that I can recall.

Q Well, does that statement surprise you of Mr. Lyons' behavior?

A No.

Q How would you describe Mr. Lyons' [p. 25] personality, from a co-worker's standpoint, having worked with him and bunked with him for a long period of time?

A As a co-worker, he was a good supervisor. He knows his job. And he is always giving everybody a fair chance, all the guys that ever worked with us.

Q What about putting – what about physically putting his hands on people and acting in a sexual manner with them? People meaning other male employees offshore, putting his hands on their rear ends, their crotches, or physically restraining them and sucking on their neck?

A I don't understand that question.

Q Have you ever seen him put his hands on a co-worker's rear end?

A Yes, sir.

Q Have you ever seen him put his hands on a co-worker's crotch, in the genital area?

A I seen him touch them there before, not actually grab them.

Q You witnessed the incident involving Mr. Brumfield where he was held down and Mr. Lyons sucked on his neck?

[p. 26] A Yes, sir.

Q Do you consider that appropriate employee behavior?

A No, sir.

Q Were you in the room when it occurred?

A Yes, sir.

Q Did you participate in restraining Mr. Brumfield?

A No, sir, I didn't restrain him.

Q You didn't participate in restraining him; is that correct?

A That's correct.

Q But you were present?

A Yes, sir.

Q Did you make them stop?

A No, sir.

Q In your capacity as driller, could you have made them stop?

A Yes, sir.

Q In your capacity as driller, if they would not have stopped upon your direction, could you have fired them?

A I could have brought to it [sic] my supervisor's attention.

Q And recommended termination?

[p. 27] A Yes, sir.

Q Because that kind of behavior is inappropriate offshore, isn't it?

A Yes, sir.

Q It's inappropriate period, isn't it?

A Yes, sir.

Q Just like a hypothetical allegation of people putting their penis on a co-worker?

A Yes, sir.

Q You were here for Mr. Johnson's testimony. He doesn't think that those types of allegations, of someone being physically restrained, having a penis placed on them, that's – he said that's not what living offshore is all about, is it?

A No, sir.

Q It's not horseplay, is it?

MR. BROWN: Object to the extent that it calls for a legal conclusion.

BY MR. LaPLACE:

Q That type of activity, being physically restrained, having a penis placed on your body, that's not horseplay, is it?

A I don't think it is.

[p. 28] Q If someone physically retrains you, and someone puts a penis on you, how would you react, sir?

A There would be a fight.

Q Why would that be, sir?

A Because I don't want nobody putting that on me.

Q Fine, sir. But you categorically dispute Mr. Oncale's allegation that on the boat between – on the way out to 266-A that you physically restrained him and let John Lyons put his penis on the back of his head?

A I dispute it?

Q Yes, sir.

A Meaning – what does that mean?

MR. BROWN: Do you agree or –

BY MR. LaPLACE:

Q Deny or dispute it?

A I deny it.

Q It never occurred?

A Never.

Q You never saw Mr. Lyons put his penis anywhere on Mr. Oncale?

[p. 29] A No, sir.

Q Now, as I appreciate your testimony, Mr. Oncale's work assignments were dictated and directed by Mr. Lyons?

A Yes, sir.

Q But you could also direct him to do something for you, correct?

A Correct.

Q He was on the crew as a roustabout, so if you needed something done, you could call him over there to have it done, as long as it didn't interfere with your drilling activities, it required experience and knowledge, correct?

A Correct.

Q I'm not saying you would turn your drilling operation over to Mr. Oncale. I'm saying if you needed

something done right quick, something brought to you, you could tell him to do it, and it was his responsibility to respond immediately; is that correct?

A Yes, sir, he was one of them.

Q Who was Val Hohen?

A He was our safety compliance clerk.

Q Do you know what his job description [p. 30] entailed?

A He would oversee all the safety meetings and check all the safety equipment on the rig.

Q Are you aware of a safety meeting that took place where Mr. Hohen gave instructions to or warnings to Sundowner employees to stop physically harassing each other in a sexual manner, i.e. grabbing, holding, or in any way overtly acting in a sexual nature to co-workers?

A I think I recall a safety meeting.

Q Tell me what you recall.

A Basically what you said, you know. Val said that, you know, that we didn't need any childlike playing, or playing, grabbing people on the rear end or thumping anybody on the rig.

Q Or restraining them physically and putting your dick on them?

A I don't remember that.

Q But Val would be the person to instruct the employees to stop certain behavior as they were considered inappropriate offshore; is that correct?

[p. 31] A More or less.

Q Well, you wouldn't – you were in the safety meeting yourself. You could have said I agree with that, you need to stop doing that, or dispute that it even took place.

A I could agree with it. I mean, you know, if it took place.

Q Well, do you know why Mr. Hohen was giving this instruction to people?

A No, sir.

Q Were you aware Mr. Brumfield made complaints to him about being physically restrained and having his neck sucked on?

A No, sir.

Q Did you know Mr. Oncale had made complaints to Mr. Hohen about overt sexual touching of his body by other co-workers?

A No, sir.

Q Was Mr. Edwards present at that safety meeting when this was discussed?

A I don't recall.

Q Was Mr. Edwards usually involved in the safety meetings?

A Yes, sir.

[p. 32] Q How often would a safety meeting occur, sir?

A Once a day.

Q Every 12 hours, usually before a new shift started; is that correct?

A Yes, sir.

Q To kind of get the crew up to speed on what ya'll – the first shift had just finished doing, what they're expected to do, how to go about doing it?

A Correct.

Q That's a good way to operate the rig, isn't it?

A Yes, sir.

Q But employee misconduct among each other also affects safety, doesn't it?

A Yes, sir.

Q Especially the kind that causes tension among the employees; isn't that correct, sir?

A Correct.

Q Were you aware of tension between Mr. Oncale and Mr. Lyons when he worked offshore between August of '91 and November of '91?

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE

VERSUS

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON

JUDGMENT

(Filed March 24, 1995)

The Court having granted the motion for summary judgment of defendants Sundowner Offshore Services, Inc., John Lyons, Danny Pippen, and Brandon Johnson;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants Sundowner Offshore Services, Inc., John Lyons, Danny Pippen, and Brandon Johnson, and against plaintiff, Joseph Oncale, dismissing plaintiff's claims with prejudice.

New Orleans, Louisiana this 23nd day of March, 1995.

/s/ G Thomas Porteous
G. Thomas Porteous, Jr.
United States District Judge

MINUTE ENTRY
PORTEOUS, J.
MARCH 23, 1995

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	CIVIL ACTION
VERSUS	NO. 94-1483
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON	SECTION "T" (Filed March 24, 1995)

Before the Court is Defendants' Motion for Summary Judgment. Plaintiff, Joseph Oncale, has filed opposition. This motion came before the Court for hearing on March 8, 1995.

Background

Plaintiff was employed as a roustabout by Sundowner Offshore Services, Inc. ("Sundowner") for several weeks in November of 1991. Plaintiff filed this suit for damages against Sundowner and three male individuals employed by Sundowner, John Lyons ("Lyons"), Danny Pippen ("Pippen") and Brandon Johnson ("Johnson"), alleging violations of the Civil Rights Act, Section 703(a)(1) of Title VII, and 42 U.S.C. 2000(e)-2(a)(1). Specifically, plaintiff seeks reinstatement to his former position or to a similar position, or in the alternative, damages resulting from the alleged sexual discrimination and

harassment he experienced while employed by Sundowner.

Standard for Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The Fifth Circuit has explained that "[t]he Supreme Court has defined material facts as those that will affect the outcome of the lawsuit under governing law." *Meyers v. M/V Eugenio C.*, 919 F.2d 1070, 1072 (5th Cir. 1990), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Plaintiff's Complaint Does Not Give Rise to a Title VII Violation

Plaintiff's complaint alleges specific physical acts and verbal assaults perpetrated against plaintiff by Lyons, Pippen and Johnson. These acts and assaults, if proven, would constitute outrageous conduct by the defendants which would be actionable under Louisiana law.[1] However, plaintiff's complaint in this matter only alleges violations of Title VII, and the Fifth Circuit has clearly articulated its position that same sex harassment does not state a claim under Title VII. *See Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994).

The issue presented to the Fifth Circuit in *Garcia* was whether the district court erred in granting summary

[1] The Court is suggesting that plaintiff could have timely brought a state action.

judgment in favor of the defendants[2], dismissing Garcia's claim that he had been sexually harassed by a male coworker during his employment, in violation of Title VII. Affirming the grant of summary judgment, the Fifth Circuit explained that Garcia was limited to seeking equitable relief because the provisions of the Civil Rights Act of 1991 providing for damages were not retroactively effective as to his claim.[3] However, the Court continued its analysis, ruling that:

> Garcia's Title VII claim was also properly dismissed because he did not establish a prima facie case against any of the defendants.

Id. at 450. The Court explained that "Title VII prohibits an 'employer' from discriminating 'against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.' " *Id.* Section 2000e(b) defines an employer as "a person engaged in an industry affecting commerce . . . and any agent of such a person. . . . In this Circuit, we have accorded the phrase 'any agent' a liberal construction. . . . ". *Id.* at 451. The "liberal construction" has been extended to include immediate supervisors who participate in the decision-making process that forms the basis

[2] Named as defendants in the *Garcia* suit were the parent company of Garcia's employer, the plant manager, and the plant foreman.

[3] Because no further incidents of harassment occurred after Garcia complained to his supervisors, and because Garcia continued in his employment with Seagraves Oazark, equitable relief was inappropriate, and damages were unavailable.

of the discrimination. However, "[t]here can be no liability under Title VII . . . 'for the actions of mere co-workers.' " *Id.* (citation omitted).

Although the *Garcia* court found an independent basis to affirm the grant of summary judgment as to each defendant, it concluded as follows:

> II. Sexual Harassment
>
> Finally, we held in *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished), that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Accord Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). Thus, what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.

Id. at 451-52. Plaintiff argues that the above quoted language is dicta, however the Court disagrees. Although the *Garcia* court articulated other grounds to support its affirmance of summary judgment, it included the above quoted language and explicitly stated that summary judgment "was proper on this basis also." Following the clear directive of the Fifth Circuit in *Garcia*, this Court is compelled to find that Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers.

In addition, the Court finds that defendants Pippen and Johnson cannot be considered plaintiff's employer under Title VII, further supporting the Court's ruling granting summary judgment. *See* Affidavit of Edward M. DuBroc, attached to defendant's motion for summary judgment.[4]

Accordingly, finding that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, defendant's motion for summary judgment is hereby *granted*.

/s/ G Thomas Porteous
G Thomas Porteous, Jr.
United States District Judge

---

[4] Mr. DuBroc, the personnel director for Sundowner Services, Inc., states in his affidavit that plaintiff's direct supervisor on the rig would have been Lyons. Pippen, a driller, was the direct supervisor of derrick hands and floor hands, not of roustabouts. Johnson was a floor hand, and his supervisor was Pippen.

Joseph ONCALE, Plaintiff-Appellant,

v.

SUNDOWNER OFFSHORE SERVICES, INC., John Lyons, Danny Pippen, and Brandon Johnson, Defendants-Appellees.

No. 95-30510.

United States Court of Appeals,
Fifth Circuit.

May 20, 1996.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before SMITH, DUHÉ, and DeMOSS, Circuit Judges.

DUHÉ, Circuit Judge:

Appellant Joseph Oncale filed this suit against Sundowner Offshore Services, Inc., ("Sundowner"), John Lyons, Danny Pippen and Brandon Johnson, alleging that he had been sexually harassed during his employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The district court granted summary judgment in favor of the defendants and dismissed Oncale's case. Because our decision in *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir.1994), holds that same-sex harassment is not cognizable under Title VII, we affirm.

BACKGROUND

Joseph Oncale was employed by Sundowner on an offshore rig from August to November 1991. Oncale filed this Title VII action against Sundowner, John Lyons, his Sundowner supervisor, and Danny Pippen and Brandon Johnson, two Sundowner co-workers, alleging sexual harassment. Oncale alleges that the harassment included Pippen and Johnson restraining him while Lyons placed his penis on Oncale's neck, on one occasion, and on Oncale's arm, on another occasion; threats of homosexual rape by Lyons and Pippen; and the use of force by Lyons to push a bar of soap into Oncale's anus while Pippen restrained Oncale as he was showering on Sundowner premises. Oncale alleges both *quid pro quo* and hostile work environment sexual harassment.[1] Oncale quit his job at Sundowner soon after the shower incident.

The district court granted summary judgment on Oncale's Title VII claim, relying upon our statement in *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir.1994), that harassment by a male supervisor against a male subordinate does not state a claim under Title VII. Thus, the court concluded that it was "compelled to find that Mr. Oncale, a male, has no cause of action under Title

---

[1] Sexual harassment in the workplace violates Title VII if it constitutes *quid pro quo* harassment, i.e., a supervisor conditions job benefits either explicitly or implicitly on an employees participation in sexual activity, *see Jones v. Flagship Int'l*, 793 F.2d 714, 721-22 (5th Cir.1986), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987), or if it alters an employee's working conditions by creating a hostile work environment because of the employee's sex. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993).

VII for harassment by male co-workers." Finally, the court found that Oncale's co-workers, Pippen and Johnson, could not be held liable as "employers" under Title VII.

DISCUSSION

Precedential Value of Garcia

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. § 2000e-2(a)(1). Appellant and the Equal Employment Opportunity Commission (as *Amicus Curiae*) argue that Title VII's prohibition against sex discrimination and the Supreme Court's sexual harassment decisions are formulated in gender-neutral terms, and therefore, prohibit all discrimination *because of sex*, whether it is discrimination against men or women. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (referring to "victims" of sexual harassment, and not just female victims, and adopting "reasonable person" standard for measuring offensiveness of work environment); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986) (" 'Surely a requirement that a *man or woman* run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.' ") (emphasis added) (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir.1992)). Under this reading of the statute, so long as the plaintiff proves that

the harassment is because of the victim's sex, the sex of the harasser and victim is irrelevant.

This panel, however, cannot review the merits of Appellant's Title VII argument on a clean slate. We are bound by our decision in *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir.1994), and must therefore affirm the district court. Although our analysis in *Garcia* has been rejected by various district courts,[2] we cannot overrule a prior panel's decision. In this Circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the Court *en banc* or the Supreme Court. *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir.1991).

This Circuit's same-sex Title VII jurisprudence began with *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir.1993) (per curiam) (unpublished), *cert. denied*, ___ U.S. ___, 115 S.Ct. 311, 130 L.Ed.2d 274 (1994). Although the holding in that case is not entirely clear, it appears that the Court

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[2] These cases include *Williams v. District of Columbia*, 916 F.Supp. 1, 8 (D.D.C.1996); *Sardinia v. Dellwood Foods, Inc.*, 1995 WL 640502, at *4-5 (S.D.N.Y. Nov. 1, 1995); *King v. M.R. Brown, Inc.*, 911 F.Supp. 161, 167 (E.D.Pa.1995); *Ecklund v. Fuisz Technology, Ltd.*, 905 F.Supp. 335, 338 (E.D.Va.1995); *Raney v. District of Columbia*, 892 F.Supp. 283, 286 (D.D.C.1995); *Griffith v. Keystone Steel & Wire*, 887 F.Supp. 1133, 1136 (C.D.Ill.1995); *E.E.O.C. v. Walden Book Co., Inc.*, 885 F.Supp. 1100, 1101 (M.D.Tenn.1995); *Roe v. K-Mart Corp.*, 1995 WL 316783, at *1 (D.S.C. March 28, 1995); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F.Supp. 1545, 1550 (M.D.Ala.1995); *McCoy v. Johnson Controls World Services, Inc.*, 878 F.Supp. 229, 231 (S.D.Ga.1995).

ruled that male-on-male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex. Next, in *Garcia*, we extended *Giddens* to bar all same-sex sexual harassment claims:

> Finally, we held in *Giddens v. Shell Oil Co.*, No. 92-8533 [12 F.3d 208] (5th Cir. Dec. 6, 1993) (unpublished), that '[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.' *Accord Goluszek v. Smith*, 697 F.Supp. 1452, 1456 (N.D.Ill.1988). Thus, what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.

This discussion seems to indicate clearly that same-sex harassment claims are not viable under Title VII. When read in its proper context, however, this final paragraph of the *Garcia* opinion poses an interpretive problem. Because the Court had already found an independent basis to affirm the grant of summary judgment to each defendant, no part of this analysis is necessary to support the ultimate decision. Thus, the question arises whether we should treat *Garcia's* pronouncement on same-sex sexual harassment as binding precedent or dictum. When faced with this issue, some district courts in this Circuit (like the trial court here) have applied *Garcia* to dismiss same-sex harassment claims. *See Sarff v. Continental Express*, 894 F.Supp. 1076, 1082 (S.D.Tex.1995); *Myers v. City of El Paso*, 874 F.Supp. 1546, 1548

(W.D.Tex.1995). Others, by contrast, have ruled that *Garcia's* statements about same-sex harassment are dicta. *See Pritchett v. Sizeler Real Estate Mgmt. Co.*, 1995 WL 241855, at *2 (E.D.La. April 25, 1995); *Castellano v. Whole Foods Market, Inc.*, No. H-94-2673, slip op. at 7-8 (S.D.Tex. October 26, 1995).

We read *Garcia's* analysis of sexual harassment as binding precedent. After stating that Title VII does not recognize male-on-male claims, the Court explicitly stated that summary judgment "was proper on this basis also." This language suggests that the same-sex rationale for rejecting Garcia's claim is an alternative holding, which we treat as *stare decisis* in this Circuit. "It has long been settled that all alternative rationales for a given result have precedential value. 'It does not make a reason given for a conclusion *obiter dictum*, because it is the only one of two reasons for the same conclusion.' " *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 925 n. 21 (5th Cir.1977) (quoting *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340, 48 S.Ct. 194, 196, 72 L.Ed. 303 (1928)). Moreover, another panel of this Court has recognized *Garcia* as binding precedent on the issue of same-sex harassment, thereby resolving any uncertainty about *Garcia's* precedential force. *See Blake v. City of Laredo*, 58 F.3d 637 (5th Cir.1995) (per curiam) (unpublished). Therefore, *Garcia* remains the law of this Circuit.[3]

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[3] Although no circuit split yet exists, other circuits have indicated that same-sex claims should not be excluded from Title VII's purview. *See, e.g., Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir.1995) (In a heterosexual harassment action, the court noted parenthetically that "[s]exual harassment of women by men is the most common kind, but we do not mean to

CONCLUSION

For the foregoing reasons, the decision of the district court is AFFIRMED.

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exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not be actionable in appropriate cases."). Similarly, in concurring with the Second Circuit's decision in *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994), Judge Van Graafeiland observed, "harassment is harassment regardless of whether it is caused by a member of the same or opposite sex." The District of Columbia Circuit has also acknowledged the possibility of actionable sexual harassment under Title VII where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender." *Barnes v. Costle*, 561 F.2d 983, 990 n. 55 (D.C.Cir.1977).

The Fourth Circuit, by contrast, recently held that harassment among *heterosexuals* of the same sex cannot give rise to a hostile environment sexual harassment claim under Title VII. *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir.1996). *McWilliams*, however, explicitly does not "purport to reach any form of same-sex discrimination claim where either victim or oppressor, or both, are homosexual or bisexual." *Id.* at 1195 n. 4. In a later decision, the Fourth Circuit in dicta expressed its disagreement with the reasoning of *Garcia*. *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 751 (4th Cir.1996).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30510

JOSEPH ONCALE,

Plaintiff-Appellant,

versus

SUNDOWNER OFFSHORE SERVICES INCORPORATED; JOHN LYONS; DANNY PIPPEN; BRANDON JOHNSON;

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

---

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 5/20/96, 5 Cir., ___, ___ F.3d ___)

(July 12, 1996)

Before SMITH, DUHÉ, AND DeMOSS, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested

that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhé, Jr.
United States Circuit Judge

Supreme Court, U.S.
FILED
AUG 11 1997
CLERK

No. 96-568

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ONCALE,

Petitioner,

versus

SUNDOWNER OFFSHORE SERVICES, INCORPORATED; JOHN LYONS; DANNY PIPPEN; AND BRANDON JOHNSON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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43 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether same-sex (male-on-male) sexual harassment claims are actionable under the Civil Rights Act, Section 703(a) of Title VII and 42 U.S.C.§ 2000(e)-2(a)(1).

2. Whether the United States Court of Appeals for the Fifth Circuit erred as a matter of law in holding that same-sex sexual harassment claims are not cognizable under Title VII.

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CITATIONS TO THE OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 83 F.3d 118 and is reproduced in the Joint Appendix. The order of the United States Court of Appeals for the Fifth Circuit denying the suggestion for rehearing *en banc* is not reported and is reproduced in the Joint Appendix. The Judgment of the United States District Court for the Eastern District of Louisiana is reproduced in the Joint Appendix. The opinion of the United States District Court for the Eastern District of Louisiana is reported at 67 Fair Empl. Prac. Cas. (BNA) 769 and is reproduced in the Joint Appendix.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1996. Joseph Oncale's petition for rehearing and suggestion for rehearing *en banc* was denied on July 12, 1996. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1). Petitioner timely filed his petition for writ of certiorari on October 9, 1996 which was granted by the Court on June 9, 1997.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 2000e-2 provides, in pertinent part:

(a) Employer Practices. It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

STATEMENT OF THE CASE

A. Procedural History

Through complaint for damages filed in the United States District Court for the Eastern District of Louisiana on May 5, 1994, Joseph L. Oncale advances a same-sex sexual discrimination action against Sundowner Offshore Services, Inc., Oncale's payroll employer at the time of the alleged harassment, and three male co-workers, John Lyons, Danny Pippen and Brandon Johnson. Joseph Oncale alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a)(1), and seeks remedies and relief as provided for under law. In response, the defendants filed a general denial and, ultimately, a summary judgment motion, challenging Joseph Oncale's right to advance a male-on-male sexual harassment claim under Title VII. The Employer's summary judgment motion was heard in the District Court on March 8, 1995.

Through Judgment entered March 24, 1995, the Honorable G. Thomas Porteous, Jr., United States District Judge, granted summary judgment in favor of the defendants. Finding the Fifth Circuit, through *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994), had

"clearly articulated its position that same-sex harassment does not state a claim under Title VII," the District Court concluded Mr. Oncale, a male, could not, as a matter of law, advance a cause of action under Title VII for harassment by male co-workers. Further, the District Court observed that defendants Pippen and Johnson could not be considered Oncale's "employers" under Title VII. A timely appeal followed.

On May 20, 1996 the Fifth Circuit affirmed the trial court's summary judgment determination, holding that same-sex sexual harassment is not cognizable under Title VII. In response, Joseph Oncale requested rehearing and reconsideration of the matter *en banc*. This effort to obtain reconsideration of the Fifth Circuit's categorical rejection of same-sex sexual harassment claims under Title VII failed and petition to this Court followed.

B. Background Facts

Mr. Oncale's claim arises out of a series of events that occurred during his employment as a roustabout assigned to an off-shore drilling location with Sundowner Offshore Services between August and November of 1991.[1] Joseph

[1] Oncale was hired through Sundowner's Houma Louisiana office and worked "seven days on, seven days off" on Chevron USA's Ship Shoal 266-A platform. During his shift, Mr. Oncale worked on Platform A and stayed in the crew's quarters located on Platform B. At all relevant times, Oncale's crew consisted of John Lyons, crane operator, Danny Pippen, driller, Brandon Johnson, roughneck, a derrick hand and two other roustabouts.

Oncale was denied his civil and employment rights in violation of law, as over a number of weeks he was sexually assaulted, battered, touched, and threatened with rape by his direct supervisor, John Lyons, and a second supervisor, Danny Pippen, who, as a driller for Sundowner, exercised de facto control over the terms and conditions of Oncale's employment. The third individual defendant, Brandon Johnson, a co-worker with no apparent supervisory authority, assisted John Lyons in one of the attacks.[2]

Mr. Oncale, who suffered several direct, sexual assaults and innumerable threats of continuing sexual abuse and who twice reported the situation to his

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[2] The facts testified to by Joseph Oncale, which must be accepted as true for purposes of Sundowner's summary judgment motion and this appeal, are that on October 25, 1991 Danny Pippen grabbed and held Oncale as the crew was being transported by boat from Platform A to Platform B. John Lyons then removed his penis from his pants and placed it on the back of Oncale's head. As Oncale struggled to free himself Lyons said he was going to "f . . . (Oncale) in the behind." The sexual harassment continued.

The next morning, as the crew was being lifted onto Platform A in a personnel basket, Brandon Johnson grabbed and restrained Oncale to facilitate another sexual assault by Lyons. During this attack Lyons again removed his penis from his pants, this time placing it on Oncale's arm and again assuring Oncale that he would have to submit to these sexual advances.

The sexual assaults continued as the crew returned to their quarters on October 26, 1991. As Oncale was taking a shower, Pippen and Lyons got into the shower stall with Oncale. Pippen pinned Oncale as Lyons inserted a bar of soap into "the cheeks of his (Oncale's) behind." As they held Oncale both men, Pippen and Lyons, assured Oncale that they were going to "f . . . (Oncale) in the behind."

employer's highest ranking representative on the job site to no avail, was forced to quit his employment as he feared that were he to stay he "would be raped or forced to have sex."[3] J.A. 70-72. The facts of the vulgar and violent actions of the individual defendants and the circumstances under which Joseph Oncale reported the sexual harassment to his toolpusher and safety director were fully submitted to the Trial Court in response to the summary judgment motion. J.A. 74-80. The summary judgment record also includes the admission by Brandon Johnson that he restrained Joseph Oncale while John Lyons said he was going to put his penis on Oncale.

The background facts, thus, are that Mr. Oncale's immediate supervisors, John Lyons, and another supervisor, Danny Pippen, who had *de facto* control over the conditions of his employment, physically restrained him on two occasions while John Lyons placed his penis on Mr. Oncale's head and arm. The supervisors further violated Oncale sexually on a third occasion when John Lyons attacked Mr. Oncale in the showers and forced a bar of soap into Mr. Oncale's anus while Danny Pippen held Mr. Oncale. The supervisors attacked Joseph Oncale both in the designated work areas of the rig while Mr. Oncale was on duty and in the showers/living quarters, repeatedly assuring Oncale that they desired and intended sexual intercourse and that they would continue with their assaults as long as Mr. Oncale remained employed on the Sundowner rig. The Safety Director and

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[3] After each of the sexual attacks Oncale reported the events to Valent Hohen, Jr. Safety Compliance Clerk for Sundowner. Hohen refused to take any action.

Toolpusher, the highest ranking employees of Sundowner on the rig, were fully informed of the sexual assaults and harassment but did nothing to halt the repeated sexual threats and sexual battery. Instead, Mr. Lyons assured Joseph Oncale that his reporting of the sexual harassment would not bring an end to the ordeal. The pattern of violent harassment eventually forced Oncale to quit his employment. On November 10, 1991 Sundowner's Safety Compliance Officer signed a Separation Notice which identifies the reason for leaving as: "Voluntary Leaving due to sexual harassment and verbal abuse."

The deposition testimony of Danny Pippen is that he grabbed Joseph Oncale "on his butt occasionally." J.A. 93. Mr. Pippen then acknowledged that the sexual assaults complained of did not constitute "horseplay" within the community of offshore laborers. J.A. 97. Further, Danny Pippen admits that, as a driller, he had authority to direct and terminate Mr. Oncale's employment. J.A. 92-100.

SUMMARY OF THE ARGUMENT

Discrimination "because of sex", as it has evolved through the administrative process, and this Court's recognition of sexual harassment as a form of sex discrimination, is more than gender-driven denial of specific employment opportunities. Title VII prohibits conduct of an employer which implicitly or explicitly communicates that an individual's right to continued employment is conditioned upon submission to unwelcomed sexual advances. When an individual of either gender reasonably perceives that he must abandon his employment to

escape unwelcome sexual harassment and verbal and physical sexual assault, he is the victim of employment discrimination based on sex as proscribed by Title VII. The sexually harassing nature of the defendant's conduct is determined through analysis of the facts and circumstances underlying the claim, and not by the gender of the defendant or his sexual preferences.

Lyons', Johnson's and Pippen's act of selecting Joseph Oncale to be the victim of their unwelcomed sexual advances is actionable under Title VII. Joseph Oncale, alone among the males in the work place, was forced to tolerate his direct supervisors' deviant sexual approaches as a condition of his employment. The harassment was sexual, it was unwelcomed, it altered the reasonable conditions of his employment and Joseph Oncale, an individual, belongs to a protected class. The record confirms that Lyons, Johnson, and Pippen said what they said and did what they did because Joseph Oncale was a male. They used sexual talk and activity to demean and humiliate him. They chose their words and conduct because Oncale was a man, knowing that such language and conduct would degrade him as a man. Their conduct was sexual in nature, offensive, unwelcome, and therefore actionable under Title VII.

To the extent the decision below and the Fifth Circuit's decision in *Garcia v. Elf Atochem North America, supra* act as a bar to a same-sex sexual harassment claim under Title VII they are inconsistent with the language, scope and purpose of applicable law as defined by the United States Supreme Court and must be set aside. There is no textual, historical, jurisprudential or logical basis for the Fifth Circuit's categorical rejection of same-

sex actions under Title VII. The plain language of Title VII neither commands nor supports the Fifth Circuit's interpretation of the law. The legislative history is silent and the authority found by the Fifth Circuit, to the limited extent rejection of Mr. Oncale's claim is explained in the light of published opinion, is unpersuasive on its face and inconsistent with the approach employed by the courts in addressing reverse discrimination and intra-class discrimination claims. The Fifth Circuit's position also conflicts with this Court's gender neutral, fact-driven analysis in *Meritor* and *Harris*. This Court should overturn the Fifth Circuit's absolute rejection of same-sex actions under Title VII and allow Joseph Oncale to proceed with his claims.

ARGUMENT AND AUTHORITIES

I. The Fifth Circuit's Categorical Rejection of Same-Sex Harassment Claims Is Inconsistent With the Plain, Unambiguous Language of Title VII.

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. Section 2000e-2(a)(1). This Court has interpreted the ban on sexual discrimination to include sexual harassment in the workplace. The sexual harassment proscribed includes both hostile or abusive environment claims as well as sexual conduct or activity which is directly linked to the grant or denial of an economic quid pro quo.

Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986).

When interpreting a statute, a court must first look to the plain meaning of the statute's text rather than seek guidance from an extratextual source as an interpretative aid.[4] The United States Court of Appeals for the Seventh Circuit recently applied this well settled principle in *Doe v. City of Belleville, Illinois*, No. 94-3600, 1997 WL 400219 (7th Cir. July 17, 1997) and held, on facts very similar to those in the instant case, that same-sex sexual harassment is actionable under Title VII.

The text of Title VII is gender-neutral and does not remotely suggest that the particular gender of the harasser or victim is a dispositive consideration in a Title VII case.[5] The statute's text, as written, does not support exclusion of same-sex claims.[6] Nothing in the language of

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[4] See, generally, *Bailey v. United States*, ___ U.S. ___, 116 S. Ct. 501, 506 (1995) (the first step in statutory construction is reading the language of the statute). See, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) (when a statute's text is clear on its face, the Court should not look to legislative history). See also *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975), cited in *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (The starting point in every case involving construction of a statute is the language itself).

[5] As the Seventh Circuit stated: "Unless we read into the statute limitations that have no foundation in the broad, gender-neutral language that Congress employed, it is evident that anyone sexually harassed can pursue a claim under Title VII, no matter what her gender or that of her harasser." *Doe*, 1997 WL 400219, at page 9.

[6] See, generally, *EEOC v. Walden Book Company, Inc.*, 885 F. Supp. 1100 (M.D. Tenn. 1995).

the statute suggests that Title VII coverage is limited to discrimination against an individual of one gender by a member of the other gender.[7]

The language of Title VII provides no support for the Fifth Circuit's absolute rejection of same-sex claims. Congress chose to use the unmodified word "sex" when referring to discrimination that is forbidden. This is a choice of an obviously gender-neutral term, just as Congress chose to prohibit discrimination based on "race" rather than discrimination against particular racial groups. Had Congress intended to prevent only different-sex sexual harassment, it could have used the term "member of the opposite sex." Congress did not do so.

Accordingly, on the basis of the unambiguous language of Title VII alone this Court should overrule the

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[7] The Seventh Circuit, rejecting the reasoning of the Fifth Circuit, stated as follows:

> The language of Title VII . . . does not purport to limit who may bring suit based on the sex of either the harasser or the person harassed.
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> * * *
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> It is, ultimately, the plain, unambiguous language of the statute upon which we must focus. . . . There is no ambiguity here. . . . [T]he words of Title VII suggest that anyone discriminated against 'because of' such individual's sex may bring suit, regardless of his gender or that of his harasser.

Doe v. City of Belleville, Illinois, No. 94-3699, 1997 WL 400219, at page 7-8 (7th Cir. July 17, 1997); see also *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) stating that court discerned no basis in statute requiring that victim and harasser be of different sexes).

Fifth Circuit's categorical pronouncement that same-sex harassment is never actionable under Title VII. As many courts have recognized, the language of Title VII is broad enough to include same-sex sexual harassment claims. In a particular case in which same-sex sexual harassment is claimed, a court must determine, based on the facts of that case, if the harassment was or was not "because of sex." The Fifth Circuit's absolute bar of same-sex claims erects an artificial barrier, unsupported by the statutory language, to such an objective case-by-case analysis of the conduct involved.

II. The Legislative History of Title VII Neither Compels Nor Supports the Fifth Circuit's Summary Refusal to Recognize Same-Sex Sexual Harassment Claims.

As previously shown, resort to legislative history or other interpretive aids is neither necessary nor appropriate in this case. The explicit text of the statute requires reinstatement of the plaintiff's claims. However, even if inquiry into legislative history is called for, virtually no legislative history is available.[8] Congress provided no

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[8] Opponents of Title VII added the proscription against sex discrimination when the bill was on the floor of the House of Representatives as a last minute attempt to prevent Title VII from passing. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-64 (1986) ("The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that 'sex discrimination' was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment.").

hint in the statute as to what it meant by the term "sex" and did not address the issue of sexual harassment. While debating whether to add the prohibition against discrimination based on sex, members of the House of Representatives, however, had a discussion confirming that Title VII would cover both men and women.[9]

Accordingly, the Fifth Circuit's rejection of same-gender sexual harassment claims rests upon unsupportable assumptions and proclamations as to the "underlying concerns" of Congress. When maintaining, as it does, that the conduct alleged by Mr. Oncale was not of the type Congress intended to prohibit when it enacted Title VII, the Fifth Circuit can cite nothing in support of this position because so little legislative history of the act exists regarding discrimination based on sex and because

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[9] House members had the following discussion:

Ms. Griffiths: I would like to ask the chairman of the committee on the judiciary, the gentlemen from New York, a question. Mr. Chairman is it your judgment that this bill will protect colored men and colored women at the hiring gate equally?

Mr. Celler: This bill is all-embracing and will cover everybody in the United States.

Ms. Griffiths: It will cover every colored man and every colored woman?

Mr. Celler: Yes, it will cover white men and white women and all Americans.

110 Cong. Rec. 2578 (1964)

no legislative history specifically addresses sexual harassment.[10] There is simply nothing in the legislative history of Title VII which suggests that courts should not recognize, first, that the plaintiff's status as a protected individual cannot be defined or limited by the gender of the "employer" and, secondly, that the "because of sex" language does not provide a textual or historical basis for a flat pronouncement that same-sex sexual harassment claims are never actionable.[11] The legislative history of Title VII provides no justification for the position that the statute covers sexual harassment between members of opposite genders but not sexual harassment between those of the same gender. Further, the thin legislative history offers no basis for definition of a sexual harassment victim's right through consideration of the "employer's" gender.[12]

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[10] See, *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976) ("The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity).

[11] The Seventh Circuit observed as follows: "[T]o attribute to Congress an intent solely to strike at sexual harassment reflecting the historic exploitation of women by their male co-workers reads far more into legislative history that amounts to little more than a last ditch effort to scuttle the entire statute." *Doe*, 1997 WL 400219, at page 8.

[12] The awkwardness of reference to the "employer's" gender underscores the weakness of the Fifth Circuit's *Garcia/Oncale* rule. While the individual defendants' gender and sexual desires may be relevant to the inquiry, the "employer," the entity ultimately responsible under law, is without gender. Logically, thus, the sexual and harassing nature of the work place conduct must remain the focus.

Ironically, in spite of Congress' silence and the mischievous spirit in which the term "sex" was added at the eleventh hour, the Fifth Circuit's *Garcia/Oncale* approach is based upon a "plain meaning/Congressional intent" doctrine first suggested by the United States District Court for the Northern District of Illinois in *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988). Without citation or analysis, the district court in *Goluszek* divined the intent of Congress and declared that "it (same-sex harassment) is not the type of conduct Congress intended to sanction when enacting Title VII."[13] Respectfully, this dismissive approach to the decision of sexual harassment claims, which has found quite a number of followers,[14] is deeply flawed and should be rejected by this Court. As discussed below, the *Golusk/Garcia/Oncale* appproach is inconsistent with this Court's inclusive approach to sexual harassment claims, its recognition of reverse discrimination and intra-class claims under Title VII and the interpretive guidelines embraced by the Equal Employment Opportunity Commission; all of which allow Joseph Oncale to proceed with his Title VII action.

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[13] *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

[14] Examples of the "plain meaning" basis for rejection of same gender harassment claims include *Mayo v. Kiewest Corporation*, 898 F. Supp. 335 (E.D. Va. 1995), affirmed, No. 95-2638, 1996 WL 460269 (4th Cir. August 15, 1996) and *Hopkins v. Baltimore Gas & Electric Company*, 871 F. Supp. 822 (D. Md. 1994), aff'd, 77 F.3d 745 (4th Cir.), cert denied, 117 S. Ct. 70 (1996).

III. Recognition of Same-Sex Claims Is Consistent With the Court's *Meritor* and *Harris* decisions

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) this Court recognized for the first time that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment." *Meritor Savings Bank, supra* at 64-65. Following the lead of several circuit courts of appeal, the Supreme Court further held that "unwelcome sexual advances that create an offensive or hostile working environment" may form the basis of a claim of sex discrimination under Title VII. *Meritor Savings Bank*, supra at 64. For sexual harassment to be actionable, the Court reasoned, it "must be sufficiently severe or pervasive to alter the conditions of (the victim's) employment and create a hostile or abusive work environment." *Meritor Savings Bank*, 477 U.S. at 67 citing *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

While *Meritor* did not address same-sex or "male-on-male" harassment, nothing in the Court's analysis of remedies suggests that Title VII is limited to heterosexual harassment. To the contrary, as this Court's definition of Title VII's scope is cast in gender neutral terms the proper focus is the nature and severity of the sexual misconduct and not the gender of the harasser and victim.[15] See, generally, *Sardinia v. Dellwood Foods, Inc.*, 69 Fair. Empl. Prac. Cas. 705 (S.D.N.Y. 1995).

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[15] No matter what the gender of the harasser or victim, the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcomed' " *Meritor*, 477 U.S. at 68, citing 29 C.F.R. Section 1604.11(a) (1993).

In 1980 the Equal Employment Opportunity Commission issued guidelines which define sexual harassment as discrimination based on sex within the meaning of Title VII. See, 29 C.F.R. Section 1604.11(a) (1993). More specifically, the EEOC defines sexual harassment as follows:

> "Unwelcomed sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

The guidelines issued by the EEOC, while not controlling, do by reason of their authority, constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance. See, *Meritor Savings Bank v. Vinson, supra.* and *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-42 (1976).[16] Considering Joseph

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[16] The views of the EEOC, the agency charged with enforcement of Title VII, have been particularly persuasive when considering the language and purpose of the statute. See, e.g., *Robinson v. Shell Oil Co.*, ___ U.S. ___, 117 S. Ct. 843, 848 (1997) (adopting EEOC's position that the anti-retaliation provision of Title VII covers former employees); *Walters v. Metropolitan Educational Enterprises*, ___ U.S. ___, 117 S. Ct. 660 (1997) (adopting the EEOC's "payroll method" of counting employees for purposes of coverage under Title VII).

Oncale's claims in light of the EEOC's interpretive guidelines he has stated a viable Title VII claim because submission to unwelcomed sexual advances became a condition for his continued employment with Sundowner Offshore. The actions of his supervisors created a sexually intimidating and offensive work environment in violation of law.[17]

An interpretation of Title VII which permits same-sex harassment claims is entirely consistent with The Court's embrace of the EEOC's guidelines and its statement in *Meritor Savings Bank v. Vinson,* 477 U.S. at 64 (1986) that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." The Fifth Circuit's flat rejection of Joseph Oncale's same-sex Title VII action cannot be reconciled with the Court's *Meritor* approach to sexual harassment claims under Title VII.

The *Garcia/Oncale* approach likewise conflicts with the gender-neutral approach embraced by the Eleventh Circuit's decision in *Henson v. City of Dundee,* 682 F.2d 897, 902

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[17] The EEOC Guidelines on Discrimination Because of Sex-Sexual Harassment, 29 C.F.R. § 1604.11(a) (1993), clearly state, "[h]arassment on the basis of sex is a violation of Section 703 of Title VII." Moreover, following from the principle that Title VII prohibits sex discrimination against both genders, it is well settled that both men and women can be sexual harassers as well as victims of sexual harassment. *See* EEOC Compl. Man. (CCH) § 615.2(b)(1) (1981) (instructing that "[a] man as well as a woman may be the victim of sexual harassment," and that "a woman as well as a man may be the harasser"). See also EEOC Decision No. 81-16, Empl. Prac. Dec. (CCH) (1981) ¶ 6756 at 4796-97 (allegation that male supervisor "made unwanted sexual advances" toward male subordinate states "a violation of Title VII" if substantiated).

(11th Cir. 1982) and cited approvingly in both the lead opinion in *Meritor* and Justice Scalia's concurring opinion in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Specifically, this Court in *Meritor*, 477 U.S. at 66-67 (1986) cited the Eleventh Circuit's statement in *Henson v. City of Dundee*, 682 F.2d 897, 902 (1982):

> "Surely, a requirement that **a man or a woman** run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." (Emphasis added)

Thus the language, scope and purpose of Title VII require the conclusion that men, as well as women, can be victims of discrimination based on sex proscribed under Title VII. The "gauntlet of sexual abuse" which a worker need not tolerate as a condition of employment as a matter of logic and law must be said to include same-sex sexual abuse.

Under Title VII neither a man nor a woman can be required, as Joseph Oncale was required, to run a gauntlet of sexual abuse, as a condition of employment. To subject a selected individual to a sexually offensive and degrading environment as the price of walking in the door to go to work is to discriminate against that individual on the basis of sex. To require Joseph Oncale to endure the onslaught of sexually charged words and actions as a condition of his employment with Sundowner is to subject him to harassment based on sex. The gender of Mr. Oncale's harasser neither defines nor detracts from the sexually harassing nature of the defendants' conduct. To the contrary, one can assert with some

confidence that there is no type of conduct more repulsive to the nonconsenting heterosexual male and more certain to drive him from the work place than that engaged in by the defendants in this case. Why is such conduct so degrading and humiliating? Because Joseph Oncale is a man. The defendants targeted Joseph Oncale for harassing treatment and selected their method and manner of sexual harassment because he was a male and because of his sexual identity as a man, confident that Joseph Oncale would find the employment situation intolerable.[18]

The "evil" addressed through Title VII is more than gender-based denial of specific economic opportunities for women. Title VII prohibits conduct of an employer which communicates to an employee that he must tolerate unwelcome sexual abuse as a condition of continued employment. The Fifth Circuit's summary dismissal of Joseph Oncale's claims is at odds with this precept and this Court's analysis of the parameters of sexual discrimination in *Harris v. Forklift Systems*, Inc., 510 U.S. 17 (1993).

In *Harris* the Court was called upon to define a discriminatorily "abusive work environment." The Court plainly defined the scope of Title VII of the Civil Rights

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[18] As the Seventh Circuit explained in its recent decision recognizing same-sex sexual harassment, gender becomes "inextricably intertwined with the harassment," *Doe*, 1997 WL 400219, at page 13, and the harassers chose the conduct "With just this likelihood in mind – that is, that their intent was to humiliate him as a man." Id. at page 15.

Act of 1964 in gender-neutral terms: "Title VII bars conduct that would seriously affect *a reasonable person's* psychological well-being." (Emphasis added). *Harris*, 510 U.S. at 21-22 (1993). Where the environment would be reasonably perceived, and is perceived, as hostile or abusive, the "individual," "reasonable person" or "victim", be he male or female, is entitled to pursue the remedies afforded through Title VII. *Harris, supra.*[19] The gender of the harasser does not limit or define the reasonableness of the victim's perceptions.

In *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), the Ninth Circuit reviewed a hostile environment sexual harassment action brought by a female employee of the Internal Revenue Service and held:

> " . . . a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."

Then, in an important footnote which foreshadowed the "reasonable person" standard adopted in *Harris*, the Ninth Circuit stated:

> "Of course, where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's

[19] As the record below establishes, Mr. Oncale would and did find the circumstances of his employment situation hostile and sexually abusive.

> perspective would be that of a reasonable man." *Ellison*, 924 F.2d at 879, n.11.

Given this language and this Court's adoption of a "reasonable person" approach to analysis of sexual harassment claims, it must be determined that Joseph Oncale has complained of sexual harassment (defined by the EEOC as "unwelcomed sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature," see, 29 C.F.R. Section 1604.11(a) (1993)) which the reasonable man could consider sufficiently severe to alter the conditions of his employment and create an abusive work environment. He is entitled to the full protections of Title VII.

This Court has twice recognized the broad purpose of the statute in proscribing sexual harassment. In *Meritor*, this Court stated that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult.[20] This Court noted further in *Harris* that the "very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of work place and quality."[21] In both *Meritor* and *Harris* the Court found the important factors for proving a claim for sexual harassment to be the unwelcome nature of the advances and the effect of the harassment on the victim. As the Court stated in *Meritor* 477 U.S. 57, 68 (1996), "the gravamen" of any sexual harassment claim is that the alleged sexual advances are

[20] *Meritor*, 477 U.S. at 68.

[21] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993)

"unwelcome." Whether an environment is "hostile" or "abusive," must be considered and determined only through evaluation of all the circumstances and the conduct of the individuals involved. The relevant circumstances, the Court noted, may include frequency of the discriminatory conduct; the severity, whether it was physically threatening or humiliating, or mere offensive utterance; whether it unreasonably interfered with an employee's work performance as weighed and considered through the reasonable perceptions of the victim.[22] Nothing in this broad-based analysis of a Title VII claim suggests, much less requires, categorical rejection of same-gender sexual harassment claims. Further, nothing in this analytical framework requires proof of an "anti-male" or "anti-female" environment or immersion of the trial court into the dark waters of an individual plaintiff's or defendant's sexual orientation, preferences or needs.

Under this Court's approach in *Meritor Savings Bank v. Vinson* and *Harris v. Forklift Systems*, courts must evaluate claims of sexual harassment in individual cases and determine whether the claims are actionable. Indeed, that is why the Court articulated factors in *Harris* that were illustrative of the circumstances that could be considered. *Harris*, 510 U.S. at 24.[23]

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[22] *Harris*, 510 U.S. at 23.

[23] *Harris*, 510 U.S. at 24 (Scalia, J., concurring) ("One of the factors mentioned in the Court's non-exhaustive list – whether the conduct unreasonably interferes with an employee's work performance – would, if it were made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation in the language of the statute.").

In view of this Court's analysis of hostile environment sexual harassment, it should be clear that conduct such as that at issue in this case is "because of . . . sex." The Seventh Circuit, evaluating conduct very similar to that in this case, explained that plaintiffs must demonstrate the nexus between the harassing conduct and sex when the conduct is devoid of sexual content. *Doe v. City of Belleville, Illinois*, No. 94-3600, 1997 WL 400219 (7th Cir. July 17, 1997). However, where the conduct had "explicit sexual overtones," *Doe*, at *11, the court explained that "the content of that harassment in and of itself demonstrates the nexus to the plaintiff's gender that Title VII requires." Id. In this case, as in *Doe*, the explicit sexual language and conduct speaks for itself in establishing a nexus between the harassment and sex.

IV. Same-Sex Sexual Harassment Claims Are Merely a Type of Intra-Class Discrimination Claims, which Are Clearly Recognized Under Title VII and Other Federal Discrimination Laws

The Fifth Circuit's summary dismissal of Mr. Oncale's claims based upon the gender of the plaintiff and defendants assumes the harassment must discriminatorily affect a protected group in its entirety rather than simply the individual plaintiff in order to be actionable under Title VII. The Fifth Circuit's assumptions are erroneous and, again, contrary to the explicit terms of the statute. It is not essential to a Title VII cause of action that the discriminatory treatment be directed towards all

members of the group at issue.[24] Title VII's protections apply to "individuals."

Courts once interpreted Title VII to cover only members of minorities, non whites, because whites were "at all times a member of the majority, a member of the 'dominant' race."[25] This court has rejected this rationale, finding instead that Title VII prohibits any racial discrimination, irrespective of the race suffering discrimination.[26] Similarly, the neutrality of the term "sex" considered in light of the court's approach to intra-class and "reverse" discrimination fact patterns requires recognition of the same-sex cause of action. If the facts as pled and established at trial reveal that an employer singles out a member of his sex to harass sexually, that employer discriminates on the basis of sex.

Indeed, this Court in the context of discrimination actions under Title VII has focused its attention on the individual in determining whether discrimination has occurred. In *Connecticut v. Teal* this Court declared that Congress never intended to give an employee license to discriminate against some employees on the basis of race or sex merely because the employer treats other members

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[24] See generally, *Connecticut v. Teal*, 457 U.S. 440 (1982); *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978).

[25] See, generally *Prescott v. The Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1548 (N.D. Ala. 1995).

[26] *McDonald v. Santa Fe Trail Transportation, Company*, 427 U.S. 273, 278-79 (1976) (Stating that Title VII's coverage is "not limited to discrimination against members of any particular race.").

in the employee's groups favorably.[27] In *Los Angeles Department of Water and Power v. Manhart*, the Court recognized that fairness to a class of women employees as a whole does not justify unfairness to an individual female employee. In so holding, the Court found Title VII's focus on the individual to be unambiguous.[28]

The Fifth Circuit's declaration that a defendant employer can not discriminate against a member of his or her own gender group is without foundation and inconsistent with recognition of intra-class discrimination claims.[29] This Court and many lower courts have recognized on many occasions the possibility and actuality of intra-class harassment and discrimination. Simply stated, membership in a particular protected class does not, in fact, preclude the possibility that an individual will discriminate against members of that same class based on their membership in that class. Case law outside the realm of sexual harassment recognizes the existence of intra-group discrimination. The Court held in *Castaneda v. Partida*, 430 U.S. 482, 499 (1977) that it could not be presumed as a matter of law that individuals of one

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[27] *Connecticut v. Teal*, 457 U.S. 440, 445 (1982).

[28] *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. at 708 (1978).

[29] Again, the exact foundation for the Fifth Circuit's approach is unclear. Fair review of the court's *Garcia* and *Oncale* decisions does not reveal fully which of the noted approaches to summary dismissal of same-sex sexual harassment claims, generally labeled the "plain meaning," "not the type of conduct/Congressional intent," "anti-male or dominant male environment," and, to a lesser extent, the "but for" approaches, has been embraced by the Fifth Circuit.

definable group will not discriminate against other members within their group. This approach is reflected across the spectrum of discrimination claims. For example, the District Court in *Hansborough v. City of Elkhart Parks & Recreation Department*, 802 F. Supp. 199 (N.D. Ind. 1992) held that discrimination by an African-American against another African-American because of race violates Title VII. In *Walter v. Secretary of Treasury*, 713 F. Supp. 403, 407-08 (N.D. Ga. 1989) the District Court noted in a Title VII action it is "not controlling that . . . a black person is suing a black person." Further, in *Franceschi v. Hyatt Corporation*, 782 F. Supp. 712 (D.P.R. 1992) the District Court found discrimination by one Puerto Rican against another Puerto Rican actionable under a related statute, 42 U.S.C. Section 1981.

Harassers can and do harass members of their own class. This Court recognized in a recent opinion that intra-class discrimination exists in that one may discriminate against a member of one's own "class" and may do so with reference to a single member of the protected class, treating all other members fairly. *O'Connor v. Consolidated Coin Caterers Corp.*, ___ U.S. ___, 116 S. Ct. 1307 (1996). In *O'Connor*, the Court held that a plaintiff asserting an ADEA claim is not required, as part of his prima facie case, to prove that he was replaced by someone outside the protected class. In rejecting such a requirement, the Court stated that "the proper solution to the problem lies not in making an utterly irrelevant factor an element of the prima facie case, but rather in recognizing that the prima facie case requires *'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion. . . .'* " *Id.*, 116 S. Ct at

1310 (quoting *Teamsters v. United States*, 431 U.S. 324 (1977)). So too in the same-sex sexual harassment context there is no reason for adding the arbitrary factor that the harasser be of a different sex than the victim.[30]

V. The Proper Focus Is the Sexual Nature and the "Unwelcomeness" of the Harassment.

As this Court has stated, "the gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcomed." *Meritor Savings Bank v. Vinson*, 477 U.S. at 57. The plaintiff must show tnat he or she perceives the conduct as undesirable or offensive and that it was not solicited or invited.[31] The gender of the harasser defines neither the sexual nature of the advances nor the victim's perceptions thereof.

Unwelcomed sexual advances, ridicule, intimidation and other harassing acts are no less injurious and degrading to someone of the harasser's same gender than they are to an individual of the opposite gender. Can there be any treatment more demeaning and objectively harassing to a married, heterosexual male with two children than to

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[30] *Doe v. City of Belleville, Illinois*, No. 94-3699, 1997 WL 400219, at *21 (7th Cir. July 17, 1997) ("*O'Connor* . . . make[s] clear that we must not permit the viability of a discrimination claim to turn on arbitrary factors that do not capture the universe of actionable discrimination. We are convinced that the sexual orientation of the person who sexually harasses his co-worker is just such an arbitrary factor.").

[31] See generally, *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986)

be subjected to sexual taunts, sexual touching and physical, sexual assault by other men with whom he must work in a closely confined work space on the Outer Continental Shelf of the United States?[32] Title VII is aimed at the consequences of an employment practice rather than a particular motivation of supervisors or coworkers.[33] The factors set forth by the Court in *Harris v. Forklift Systems, Inc.* for determining the existence of a hostile environment sexual harassment claim make no reference to the gender of the victim in relation to the harasser.[34] Instead, this Court in *Harris* focused exclusively on the circumstances surrounding the harassing conduct and the effect it had on the victim. This analytical approach should be employed in the same-gender sexual harassment claims. And if employed the required conclusion at this stage of the litigation is that Joseph Oncale was harassed "because of" his gender. Based on the record the trial court reasonably could determine that Sundowners' supervisory personnel intended their remarks, actions and physical assault to demean Joseph Oncale by insulting and threatening his sexual prowess and sexual existence.[35]

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[32] As the Seventh Circuit explained, "[t]he experience was still humiliating in a deeply personal way, as only sexual acts can be." *Doe v. City of Belleville, Illinois*, No. 94-3699, 1997 WL 400219, at page 15 (7th Cir. July 17, 1997). Indeed, the Seventh Circuit characterized such conduct as humiliating the victim "as a man." Id. At page 15.

[33] *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir, 1991).

[34] *Harris v. Forklift Systems, Inc.*, 510 U.S. at 23 (1993).

[35] See, *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993).

Meritor does not require, or even suggest, that a hostile environment analysis must include consideration of the sexual orientation of the parties. Rather, the Court's factual inquiry focuses upon the conduct at issue. Under the Court's analysis a claim is stated if the harassment, judged by the objective conduct involved, is sexual and "sufficiently, severe or pervasive" to alter the "terms, conditions or privileges" of the victim's employment by creating an environment hostile to him because of his sexual existence. Earnest sexual solicitation and outrageous sexual abuse as alleged in Joseph Oncale's complaint provide a firm basis for the inference that Joseph Oncale was harassed in violation of Title VII.[36]

Additionally, there is no sexual gratification element necessary to a Title VII claim and none can be inferred from the approach adopted by this Court.[37] Characterizing same-gender sexual harassment as "homosexual" harassment suggests the need to prove an individual's sexual preference in a court of law. Such a superlative inquiry is unnecessarily complicated and intrusive and

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[36] Consider: *Tietgen v. Brown Westminister Motors*, 921 F. Supp. 1495, 1502 (E.D. Va. 1996) ("if [Oncale] can show by preponderance of the evidence that (his harasser) did indeed solicit or demand sexual acts from him, the jury may properly infer that (the alleged harasser) did so because of the plaintiff's sex within the meaning of Title VII.

[37] See *Martin v. Northfolk Southern Railway Company* 926 F. Supp. 1044 (N.D. Ala. 1996) (Court erroneously presumed that hostile environment sexual harassment is actionable only when harassment conduct is predicated upon the harasser's need for sexual gratification from the victim)

wholly inconsistent with the language, scope and purpose of Title VII. In the "traditional harassment" cases where the alleged harassment involves a male harassing a female victim, the trial court does not consider the male's assumed heterosexuality. Such an inquiry is equally irrelevant and inappropriate in the context of a same-sex sexual harassment action. In addition, inquiring into the sexual orientation of the harasser would contribute little to determination because victimization is not necessarily motivated by attraction. More commonly, harassment involves issues of power and control on the part of the harasser.[38]

VI. The Fifth Circuit's Approach Leads to Untenable Results With the Gender of the Harasser Determining Whether the Victim Has Redress for Harassment

Acceptance of the Fifth Circuit's absolute rejection of same-sex sexual harassment claims works illogical results. Sexual harassment by a supervisor of the same sex can be exaction of a condition of employment which, but for his or her sex, an employee would not have faced. Common experience requires the conclusion that there is no fundamental distinction to be drawn between the paradigm case of harassment involving a heterosexual

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[38] See generally, Catharine A. MacKinnon, The Sexual Harassment of Working Women 1 (1979) ("Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power.")

male and a female victim and the same-sex sexual harassment case.[39]

The absurd circumstances which acceptance of the *Garcia/Oncale* rule would create are underscored by the United States District Court for the Eastern District of Louisiana in the matter of *Pritchett v. Sizeler Real Estate Management Company*, No. Civ. A. 93-2351, 1995 WL 241855 (E.D. La. April 25, 1995). In *Pritchett*, the plaintiff filed an action against her former employer alleging that she was sexually harassed by her female supervisor in violation of Title VII. Dismissing the defense motion for summary judgment, the Court reasoned that it seemed discriminatory that a supervisor should be exempted from a Title VII sexual harassment claim solely because of that supervisor's sexual origination or the gender of his victim. As the Court in *Pritchett* put it, "to conclude that same-gender harassment is not actionable under Title VII is to exempt homosexuals from the very laws governing the work place conduct of heterosexuals." *Pritchett v. Sizeler Real Estate Management Company*, No. Civ. A. 93-2351, 1995 WL 241855 (E.D. La. April 25, 1995). Certainly, the clear language, broad scope and defined purpose of Title VII, as articulated by this Court, do not support such an exemption.[40] Sexual harassment is no less "because of sex" when it involves a female harassing

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[39] Consider, *Fredette v. BVP Management Associates*, No. 95-3242, 1997 WL 228588 (May 22, 1997)

[40] See generally, Catharine A. MacKinnon, The Sexual Harassment of Working Women 206 (1979) ("A woman who is fired because of her refusal to submit to a lesbian supervisor is just as fired – and her firing is just as related to her sex – as if the perpetrator were a man.").

a subordinate male or a superior of either gender harassing a subordinate of the same sex.[41]

Meritor reflects the Court's recognition that both men and women can be the victims of sexual harassment.[42] This Court has stated that Congress intended Title VII "to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor,* at 64. There is no evidence that Congress intended Title VII to apply to only one sex, one race, one color, one religion or one national origin. There is no suggestion in the opinions of this Court that the gender of the harasser and not the nature and impact of his or her conduct is determinative.

CONCLUSION

When a male supervisor propositions or harasses a selected male subordinate and conditions the subordinate's continued employment upon submission to that supervisor's sexual whim the subordinate has been discriminated against "based on sex." The Court should find the violent and vulgar sexual harassment endured by Joseph Oncale to be actionable under Title VII. John Lyons, Danny Pippen and Brandon Johnson, with the acquiescence of their superiors, required sexual favors

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41 *Id.*

42 *Griffith v. Keystone Steel & Wire,* 887 F. Supp. 1133, 1136 (C.D. Ill. 1995); *King v. M. R. Brown, Inc.,* 911 F. Supp. 161, 167 (E.D. Pa. 1995) (Conclusion that same-sex harassment is not actionable is "weakened by the Supreme Court's implicit acknowledgment that both men and women can be victims of sexual harassment").

and submission to sexual assault as a condition to Mr. Oncale's continued employment. The treatment Joseph Oncale received certainly constitutes sexual discrimination as defined by the EEOC and the Court.

The Fifth Circuit's categorical rejection of same-gender harassment claims is based either upon a faulty "plain language approach" or an insupportable requirement that the victim of sexual harassment established that the work place was "anti-male" or "anti-female" as the case may be. Or perhaps it is a reaction to the court's understandable hesitancy to address same-gender sexual harassment claims if, as an element of proof or an essential element of the claim, the defendant's sexual preferences and practices must be laid bare before the trier of fact. Whichever concern underlies the Fifth Circuit's rejection of Mr. Oncale's claim, and indeed this is a matter of speculation as the Fifth Circuit offers few clues as to its true concerns, the ultimate result, flat rejection of same-gender harassment claims, is unfounded. The language of Title VII does not allow for blanket exclusion of the claims. Indeed, it requires that they be heard. In response to a same-sex claim the trial court can continue to engage in the accepted process of decision: Examine the "employer's" conduct to determine whether it is sexual, unwelcomed and of a nature or design to sexually demean, humiliate, harass or intimidate the plaintiff. Examine the objective and subjective severity of the conduct and consider its impact upon the victim.

This Court has recognized sexual harassment as a separate and viable cause of action; a form of sex discrimination as actionable as discrimination claims arising out of traditional economic inequalities between men and

women in the work place. Recognition of same-sex sexual harassment claims is entirely consistent with, if not suggested by, existing precepts. A same-sex sexual harassment action does not present novel or difficult questions for the trier of fact and can be determined within the framework of established requirements of the cause of action. The courts will have to consider, as they do in the traditional harassment scenario, the conduct of the defendants, the sexual nature of the conduct, its offensiveness and "welcomeness" and whether it altered the reasonable terms and condition's of the victim's employment. Certainly for purposes of the defendants' summary judgment motion these elements appear to have been met. Joseph Oncale must be allowed to proceed with his claims.

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No. 96-568

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In The

Supreme Court of the United States

October Term, 1997

JOSEPH ONCALE,

Petitioner,

v.

SUNDOWNER OFFSHORE SERVICES, INCORPORATED, JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Are same-gender harassment claims ever cognizable under Title VII?

2. Is male-on-male harassment in an all-male work setting actionable under Title VII simply because there are sexual overtones to the harassment?

CORPORATE LISTING

Sundowner Offshore Services, Inc. ("Sundowner") is a wholly-owned subsidiary of Nabors Industries, Inc. ("Nabors"), a publicly traded corporation. Nabors has no non-wholly-owned subsidiaries that are publicly traded. Sundowner is not publicly traded and has no non-wholly-owned subsidiaries.

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STATEMENT OF THE CASE

A. Statement of Facts.

Joseph Oncale began working for Sundowner in late 1991 as a new roustabout on an eight-man rig crew. Joint Appendix ("App.") 76. Working offshore continuously for seven days at a time followed by seven days off, the Sundowner rig crew lived on one offshore platform and worked on a Chevron platform nearby during the seven-day work week. App. 41. The rig crew included John Lyons, the crane operator, as well as Danny Pippen, a driller, and Brandon Johnson, a floor hand. As crane operator, Lyons supervised Oncale and two other roustabouts, who held the lowest ranking positions on the crew. As driller, Pippen oversaw the work of the derrick hands and the floor hands, including Johnson. Both Lyons and Pippen reported to the tool pusher, who was in charge of the entire crew. Thus, Pippen and Johnson had no supervisory authority over Oncale. App. 41. No women were employed by Sundowner on that rig or on any other rig. *Id.*

From the start of his employment on the Sundowner crew, Oncale allegedly was subjected to verbal abuse by Lyons. App. 76. Lyons also cursed the other two roustabouts. *Id.*

Oncale claims that his fellow rig crew members sexually harassed him in three incidents during late October 1991.[1] In the first incident, on October 25, Oncale claims

---

[1] Respondents deny Oncale's allegations of harassment. However, because the district court granted summary judgment

that, while he and the other seven crew members were traveling by boat to the Chevron platform, Lyons, in plain view of the other crew members, placed his penis on the back of Oncale's head, saying that he was going to "fuck [Oncale] in [his] behind." App. 76. Pippen allegedly participated with Lyons by restraining Oncale during this incident. *Id.*

Oncale also claims that, during the day on October 26, when Oncale and the other crew members were being transported in a crane personnel basket from a boat to the Chevron platform, Lyons placed his penis on Oncale's arm. *Id.* Johnson allegedly grabbed and held Oncale during this incident. *Id.*

On the evening of October 26, a third incident allegedly occurred, which, like the prior two incidents, took place in the presence of the entire crew. Oncale was in the shower, within sight of the rest of the crew in the immediately adjacent bunk room. App. 69. Lyons and Pippen entered from the bunk room and jumped into the shower with Oncale. App. 68. With Pippen grabbing and holding Oncale, Lyons told Oncale "yeah, we know you talked to daddy [*i.e.*, the toolpusher who was Lyons' supervisor] about it but we're going to fuck you anyway." App. 67-68, 73, 76. Lyons rubbed a bar of soap between Oncale's buttocks. App. 67-68. Oncale then freed himself and threw Lyons out of the shower. App. 67. Lyons or Pippen commented to Oncale, "[w]hat's wrong, you don't want us taking a shower with us [sic]?" App. 77.

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against Oncale, Respondents treat Oncale's well-pleaded allegations as true.

After the shower incident, Lyons did not have any physical contact with Oncale. Sometime during Oncale's last week of duty, Lyons said to him, "You told your daddy [*i.e.*, the toolpusher], huh? Well it ain't going to do you no good because I'm going to fuck you anyway." App. 72-73.

Other Sundowner rig employees allegedly suffered similar treatment. On November 7 or 8, Oncale was present when a new galleyhand complained to the Chevron company representative in charge of the Chevron platform about Pippen kissing that galleyhand and Lyons telling that galleyhand that Lyons "loved him" and wanted to "fuck him in his butt." App. 80. During a safety meeting the next morning, the Chevron company representative told Lyons and Pippen "not to mess with the galleyhand anymore," explaining that the galleyhand was "new," and "green to the field" and that the galleyhand "didn't know how it was offshore." *Id.*

In another such instance, crewmembers restrained a co-worker named Brumfield so that Lyons could give him a hickey on his neck. App. 86-88, 95-96. Pippen admitted occasionally "goosing" Oncale by grabbing him on his buttocks, and Lyons touched other workers on the buttocks and in the genital area. App. 93, 95.

Oncale resigned on November 10, 1991, after being reprimanded by Lyons for taking a smoking break without Lyons' permission. Lyons used vulgar language in reprimanding Oncale, calling Oncale "an s.o.b." and a "smartass." App. 77-79. Oncale retorted that Lyons was a "smartass." App. 79. After Lyons told Oncale that he was going to "run him off," Oncale told Lyons that he quit. *Id.*

B. Course of Proceedings and Disposition Below.

Oncale brought an action solely under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), unaccompanied by any state tort law claims, against Sundowner, Lyons, Pippen, and Johnson. App. 18. In granting summary judgment, the district court relied on Fifth Circuit precedent holding "that '[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.' " *Garcia v. Elf Atochem North Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994), *quoting Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993). App. 106.[2]

The Fifth Circuit affirmed, interpreting that court's prior decision in *Garcia v. Elf Atochem North America* to hold that "same-sex harassment claims are not viable under Title VII." App. 112. In thus following *Garcia*, the Fifth Circuit recognized that *Garcia's* holding was itself based on the earlier Fifth Circuit decision in *Giddens v. Shell Oil Co.* in which that court had held that "male-on-

[2] As an alternate basis for summary judgment on Oncale's claims against Pippen and Johnson, the district court held that neither had supervisory control over Oncale and thus neither was Oncale's employer for purposes of Title VII. App. 106-07 & n.4. Pippen's job as driller gave him supervisory authority only over derrick hands and floor hands, such as Johnson, but not over roustabouts like Oncale. App. 41. Given the lack of any evidence in the record raising a fact issue on the point, Oncale erroneously continues to assert in his Petitioner's brief on the merits that Pippen had *de facto* control over him. *See* Petitioner's Brief ("Pet. Br.") at 4.

male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex." App. 111-12.

The Fifth Circuit denied rehearing en banc from the panel's affirmance of the summary judgment against Oncale on his Title VII claim. App. 116. The Court granted Oncale's petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

Title VII, as written, provides a remedy to individuals who have been discriminated against because of their "sex" with regard to "compensation, terms, conditions, or privileges of employment." Title VII provides this remedy to redress the historical subordination of women in the workplace and to further the goal of equal employment opportunity for both women and men. To accomplish the statutory purpose, the Court has found sexual harassment to be prohibited where "discrimination based on sex has created a hostile or abusive work environment."

Oncale would have the Court expand "sexual harassment" to comprehend same-gender harassment with sexual overtones where there is no showing of discrimination based on gender. This would expand Title VII beyond its language and legislative purpose by conflating sex discrimination with sexual orientation discrimination. All courts that have openly addressed the application of Title VII to sexual orientation have properly left this politically charged controversy to the political process.

An expansion of Title VII to cover same-gender sexual harassment claims would intrude deeply into the customary province of state tort law by creating a generalized prohibition of workplace misconduct in the absence of congressional findings anchoring the new cause of action in constitutional authority. Congress has not spoken, either expressly or even tacitly, on the issue of same-sex abusive behavior in the workplace. Nothing on the face of Title VII or in the legislative history would bring same-gender sexual harassment within the sweep of the statute. The Fifth Circuit has therefore correctly declined to expand Title VII beyond its language and statutory purpose and into an area where Congress has refused to go.

The great majority of courts and the EEOC have construed Title VII to require proof that the sexual harassment complained of occurred *because of gender*. No proof exists here that the alleged harm occurred because of the employee's gender. Oncale was not victimized or harassed because he is a man as opposed to being a woman. To apply Title VII to the complained-of conduct based solely on its sexual content would distort the judicial interpretation of certain sexual harassment as sex discrimination into a stand-alone sex harassment cause of action for unwelcome sexuality in the workplace.

The Fifth Circuit refused to engage in such an unwarranted expansion of Title VII. The court correctly rejects same-gender sexual harassment claims where, as in this case of all-male hazing in an all-male environment, no evidence exists of a difference in treatment because of gender.

By contrast, those courts recognizing same-gender sexual harassment claims have impermissibly expanded Title VII beyond its language and its legislative purpose. Same-gender sexual harassment claims invariably devolve into allegations of conduct that conflates gender with sexual orientation and/or conduct that, while perhaps sexually charged, does not constitute discrimination because of gender. By allowing such conduct to be actionable under Title VII, those courts unmoor the statute from its language and purpose.

ARGUMENT AND AUTHORITIES

I. TITLE VII DOES NOT REDRESS SAME-GENDER SEXUAL HARASSMENT.

In enacting Title VII, Congress has spoken specifically on the issue of workplace discrimination that enforces or perpetuates the subordination of women to men. What Congress has not done is to create through Title VII a generalized federal regulation of offensive or reprehensible workplace conduct, even if it has sexual overtones. At issue before the Court is an attempt to transform a limited federal statute prohibiting specific discriminatory conduct into a comprehensive all-purpose law of the workplace. This is a step that Congress could not take, consistent with deep principles of federalism, absent extraordinary findings. It is certainly not a step that courts may take in the absence of any statutory authorization.

A. The Language and Purpose of Title VII Does Not Encompass Same-Gender Sexual Harassment.

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[3] 42 U.S.C. § 2000e-2(a)(1). The purpose of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). Although the legislative history is sketchy, see *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-64 (1986), the brief House debate reflects that Congress included the prohibition against sex discrimination in Title VII in order to prevent discrimination against women and "to protect the employment rights of all women." 110 Cong. Rec. 2577 (1964).

As the Court acknowledged in *Khan v. Shevin*, 416 U.S. 351 (1974), the provisions in Title VII relating to sex

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[3] The Court has indicated that Title VII uses the word "sex" in the sense of "gender." *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-41 (1989) (using the terms "gender" and "sex" interchangeably); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (Title VII covers discrimination "because of . . . gender"). Title VII's ban against gender discrimination prohibits "discriminat[ion] against women because they are women and against men because they are men," *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985). *Accord J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

discrimination were needed to provide redress for inequities faced by women in the workforce. *Id.* at 353. Thus, the Court stated "[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs." *Id.* Title VII provides a mechanism for eradicating the subordinate treatment of women in the workplace in order to achieve the goal of equal employment opportunity.

Other laws passed by Congress near the enactment of Title VII shed light on Title VII's ban against sex discrimination. Just one year before passage of Title VII, Congress passed the Equal Pay Act of 1963 based on congressional findings reflecting Congress' desire to eliminate the subordination of women in the workforce. *See* 29 U.S.C. § 206 note. Thus, legislative hearings that had been conducted in connection with the Equal Pay Act informed Congress in its inclusion of the prohibition on sex discrimination in Title VII. Furthermore, since the 1964 passage of Title VII, Congress has, by its amendments to Title VII and its enactment of related antidiscrimination laws, consistently reiterated that the purpose of Title VII is to eradicate the subordinate treatment of women in the workplace, thereby fostering the principle of equal employment opportunity.[4]

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[4] In 1978, the Pregnancy Discrimination Act was introduced "to ensure that working women are protected against all forms of employment discrimination based on sex" and in recognition of the fact that Title VII's goal is to provide equal employment opportunities for women. H. R. Rep. No. 95-948 at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4750, 4755. Similarly, Congress passed the Civil Rights Act of 1991, now

The paradigm of sex discrimination prohibited by Title VII is a woman who was not hired, not promoted, demoted, or discharged because she is female. The Court has made clear that an individual claiming that an employer intentionally discriminated against her because of her gender bears the burden of proving whether that discrimination occurred. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981) (refining *McDonnell Douglas* test to clarify that burden of persuasion remains at all times on the plaintiff); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (clarifying that to survive summary judgment, plaintiff must raise fact issue that employer's proffered legitimate nondiscriminatory reason for decision is false *and* that discrimination is the real reason).

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986), the Court recognized a claim of male-on-female sexual harassment as actionable sex discrimination under Title VII. *Meritor* looked to *Rogers v. EEOC*, 454 F.2d 234

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codified as 42 U.S.C. § 1981a, in order to extend "monetary remedies for intentional discrimination to cover women and religious minorities." H. R. Rep. 102-40(I), at 14-15 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 553; *see also id.* at 65, 1991 U.S.C.C.A.N. at 603 (suggesting that "[g]ender and religious discrimination" should be treated like "racial discrimination" for "purposes of the remedial scheme provided by federal law for intentional discrimination"). Also in 1991, the Glass Ceiling Commission was created to address under-representation of women and minorities in executive, management, and senior decisionmaking positions in business and to eliminate "artificial barriers to the advancement of women and minorities in employment." *Id.* at 19-20, 1991 U.S.C.C.A.N. at 557-58.

(5th Cir. 1971), in which the en banc Fifth Circuit held that Title VII "sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." *Id.* at 238. The Court, in *Meritor*, concluded that "[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited." 477 U.S. at 66.

The Court reiterated in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), that discriminatory intent is an indispensable element of a Title VII sexual harassment claim:

> "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment. When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," . . . that is "sufficiently severe or pervasive . . . ," Title VII is violated.

510 U.S. at 21, 22 (citations omitted) (quoting *Meritor*, 477 U.S. at 65); *see also id.* at 25 (Scalia, J., concurring) ("Accepting *Meritor's* interpretation of the term 'conditions of employment' as the law, the test is not whether work has been impaired, but whether working conditions have been discriminatorily altered."); *id.* at 25 (Ginsburg, J., concurring) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed").

Prohibiting opposite-gender sexual harassment is a necessary extension of the principle of equal employment opportunity. *See DeAngelis v. El Paso Municipal Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1993) (the purpose of allowing women to bring sexual harassment claims "is to level the playing field for women who work by preventing others from impairing their ability to compete on an equal basis with men"), *cert. denied*, 116 S. Ct. 473 (1995). The judicial recognition of male-on-female sexual harassment developed as a logical outgrowth of Title VII, given the statutory purpose of remedying the subordination of women. *See* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 235 (1979) ("each incident [of sexual harassment] reproduces . . . the inequitable social structure of male supremacy and female subordination which Title VII . . . seek[s] to eliminate").

Both the remedial purpose and the equal employment opportunity principle animating Title VII likewise require recognition of female-on-male harassment. *See id.* at 202. The gender-neutral language of Title VII and the Court's opinion in *Meritor* are consistent with this understanding. *See* 477 U.S. at 67 ("Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."). Thus, "[i]t is being the victim of anti-male or anti-female bias that forms the basis of a Title VII sexual harassment claim, not simply being exposed to 'sexual'-type comments or behavior." *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 808 (N.D. Ind. 1995).

While Title VII supports a cause of action for discriminatory decisionmaking in employment regardless

whether the decisionmaker is the same gender as the claimant, that fact does not support the conclusion that same-gender sexual harassment is discrimination because of gender. In contrast to sexual harassment claims, the focus in disparate treatment claims challenging employment decisions is on the circumstances relating to the decisionmaking process because the decision itself is at issue. *See Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 739 & n.13 (N.D. Ill. 1996). The standards of proof and legal inferences that apply to discriminatory harassment claims differ from those used in typical disparate treatment cases. *Compare Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982), *with Burdine*, 450 U.S. at 252-56.

Furthermore, in contrast to employer liability for discriminatory decisionmaking, an employer is not automatically liable for sexual harassment. *See Meritor*, 477 U.S. at 72 (agency principles provide guidance in determining employer liability); *Jansen v. Packaging Corp. of Am.*, Nos. 95-3128, 96-1361, 1997 WL 459001 (7th Cir. Aug. 12, 1997) (en banc) (per curiam) (seven different opinions on what standard of liability applies to claims of sexual harassment); *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993) ("An employer becomes liable for sexual harassment only if it knew or should have known of the harassment and failed to take prompt remedial action."). This agency inquiry is obviated in discrimination claims based on decisionmaking in employment because the employer by definition ratifies its own employment decisions.

In seeking to benefit from the Court's observation in *Castaneda v. Partida*, 430 U.S. 482 (1977), that members of a class can discriminate against others in their own class,

id. at 499, Oncale and amici disregard *Castaneda's* holding that recovery under Title VII requires proof of disparate treatment because of gender. In intraclass discrimination cases calling for application of the *McDonnell Douglas* formula, plaintiffs still must show some difference in treatment from others in order to state a prima facie case. *See, e.g., Castaneda*, 430 U.S. at 486-87; *McDonnell Douglas*, 411 U.S. at 802; *Veatch v. Northwestern Mem'l Hosp.*, 730 F. Supp. 809, 820 (N.D. Ill. 1990). Consequently, Oncale and amici misplace their reliance upon this line of cases to support the actionability of same-gender sexual harassment under Title VII.

Because same-gender harassment is unrelated to the types of inequalities and discriminations that Title VII aims to eradicate, any literal compliance with the statutory language requiring discrimination because of gender transforms the statute. As Judge Niemeyer of the Fourth Circuit has observed:

> Detached from their historical setting, the terms of Title VII's prohibition of discrimination, "because of" an individual's "sex" stand only as "inert language, lifeless words," and, perhaps even "playthings" with which to reconstruct the Act.

Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 749 (4th Cir. 1996) (Niemeyer, J., concurring), *cert. denied*, 117 S. Ct. 70 (1996).

Courts that have allowed same-gender sexual harassment claims to survive summary judgment inevitably fail to adhere to the meaning of the statutory language they purport to satisfy. Whenever courts look to the homosexual orientation of the same-gender harasser to find proof

of discrimination, they drift away from the language and purpose of the statute. *See Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (equating "because of sexual attraction" with "because of sex"); *see also* EEOC COMPLIANCE MANUAL (CCH) § 615.2(b)(3) (also collapsing sexual attraction into discrimination because of sex).[5]

Likewise, courts allowing claims based on same-gender sexual harassment such as hazing, horseplay, and sexually-charged same-gender rituals (such as the men being grabbed or poked in the testicles by other men, or "bagging," found in *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1379 (8th Cir. 1996)), even if occurring in a dual-gender working environment, misunderstand such conduct as discrimination because of gender within the meaning, purpose, and intent of Title VII. *See Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (rejecting claim of male-on-male sexual harassment despite evidence employee reacted differently to female employees' harassment complaints, noting that even if plaintiff was (in that sense) harassed "because" he was a male, that harassment was not because of gender "consistent with the underlying concerns of Congress" in enacting Title VII); *see also Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 737-40 (N.D. Ill. 1996). In short, when people of the same gender sexually harass each other, their conduct never amounts to discrimination because of gender as required by Title VII.

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[5] This same inquiry has been applied to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, see 62 Fed. Reg. 12,034, 12,039 & n.13 (1997) (final policy guidance).

B. Title VII Is Not a Generalized Workplace Tort Statute.

To hold that cases involving same-gender sexually harassing conduct are actionable under Title VII as discrimination because of gender simply because of the sexual content of the conduct would write the "because of sex" language out of the statute. Title VII should not be artificially forced to address issues unrelated to its purpose. *See, e.g., McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996) (Title VII was not intended to provide "unmanageably broad protection of the sensibilities of workers simply 'in matters of sex.' "), *cert. denied*, 117 S. Ct. 72 (1996); *Hughes v. Derwinski*, 967 F.2d 1168, 1173 (7th Cir. 1992) ("Title VII is not a general bad acts statute; it only addresses discrimination.").

Congress might wish to legislate protection for all individuals from workplace harassment, but it did not do so in enacting Title VII. *See Schoiber*, 941 F. Supp. at 740. The language of Title VII would plainly have been drafted differently had Congress meant to provide such redress.[6] For example, the Minnesota Human Rights Act was recently amended to define sexual harassment as

[6] Congress has not hesitated to amend Title VII when it has disagreed with judicial interpretation, or when courts have faced concerns not contemplated by the drafters of the statute. *See* H.R. Rep. 95-948 2-3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750-51 (Pregnancy Discrimination Act legislatively overruled *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)); H. R. Rep. No. 102-40(1), at 2-3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 550-51 (Civil Rights Act of 1991 overturned five Supreme Court cases and added damages provision expressly to provide adequate remedies for victims of sexual harassment).

"includ[ing] a variety of specific behaviors" under the umbrella of sex discrimination. MINN. STAT. § 363.01, subds. 41, 14 (1996). The Minnesota Supreme Court interpreted this legislatively expanded definition of sexual harassment to render superfluous the requirement of proof of discrimination "because of sex" that applied to other sex discrimination claims. *Cummings v. Koehnen*, 568 N.W.2d 418, 1997 WL 528158, at *3 (Minn. Aug. 28, 1997).[7]

The issue of same-gender sexual harassment does not emerge from the interstices of Title VII. Because same-gender sexual harassment does not involve a difference between the sexes or otherwise implicate Title VII's remedial goal of providing equal employment opportunity for women and men, it is an entirely separate area of concern that cannot and should not be grafted onto Title VII. *See generally* Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J. L. &

[7] Commentators also have proposed statutory language that would achieve the result Oncale struggles for under Title VII in this case. *See* Deborah N. McFarland, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 FORDHAM L. REV. 493, 536-39 (1996) (suggesting federal legislation prohibiting sexually harassing conduct in the workplace without any requirement to show it occurred because of sex); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 9 YALE L. & POL'Y REV. 333, 362-63 (1990) (proposing a tort of sexual harassment modeled after the tort of intentional infliction of emotional distress); Michelle Ridgeway Peirce, Note, *Sexual Harassment and Title VII – A Better Solution*, 30 B.C. L. REV. 1071 (1989) (suggesting that new legislation that would remove inappropriate sexual conduct from the workplace by prohibiting sexual harassment based on one's sexuality, leaving Title VII to address sexual harassment based on one's gender).

FEMINISM 375, 382 (1995) (disparities of power between men and women are not perpetuated when all the actors are the same sex); CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 204 (1979) (recognizing the doctrinal problem with gay harassment).

C. Title VII Lacks Legislative Authority for Redressing Same-Gender Sexual Harassment, Particularly in Light of Congress' Refusal to Redress Sexual Orientation Discrimination.

To inject same-gender sexual harassing conduct issues into Title VII would disregard the limits Congress drew on its own exercise of authority in enacting the statute. In invoking the Commerce Clause and the Fourteenth Amendment as constitutional authority for exerting control over the workplace to remedy discrimination, Congress made no findings suggesting that the broad sweep of this law should redress same-gender sexually harassing conduct. Without statutory language, legislative intent or congressional findings articulating a basis in constitutional authority for addressing this area, an extension of Title VII to cover same-gender sexual harassment would undermine the statute's vitality as a valid exercise of congressional authority.

Congress must make appropriate findings to justify supplementing the normal functioning of state law as the primary regulation of individuals within the state. *See United States v. Lopez*, 514 U.S. 549 (1995) (imposing some threshold proof of need for impact on interstate commerce); *see also City of Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997) (distinguishing expansive congressional regulation

under the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*, from that under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb, on the basis of clear congressional findings of threats to protected rights under former but not the latter).

Congress historically has drafted explicit legislation to protect individuals from discrimination based on classifications in addition to those specified in Title VII. When Congress sought to provide redress for employment discrimination based on age and disability, it enacted separate legislation with appropriate findings to support the exercise of congressional authority over these other areas of concern. *See* Age Discrimination in Employment Act, 29 U.S.C. § 621; Americans With Disabilities Act, 42 U.S.C. § 12101. Under either the Commerce Clause or the Fourteenth Amendment, Congress, in regulating a new area of concern, must at least make the threshold and factually supported determination that the national interest is implicated in that area. Absent that determination, federalism dictates that these matters be left to state law to regulate. *See generally Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.").

According to the Court's decision in *City of Boerne*, the Voting Rights Act survived and RFRA did not because of the extent of the congressional inquiry into the magnitude of the potential harm that in turn justified federal

action. Under the Voting Rights Act, the Court found "congruence and proportionality between the [unconstitutional] injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 117 S. Ct. at 2164. In contrast, the legislative record in RFRA lacked any showing of a current danger of the harm that RFRA meant to address. *Id.* at 2169.

Because Title VII derives its authority in part from the Fourteenth Amendment, the statute must be anchored in some explanation of the constitutional concern it addresses and the remedial nature of the legislation in this area. Same-gender sexually harassing conduct does not fit into any category that has previously been recognized by Congress as an area of constitutional concern. Put simply, same-gender sexual harassment is not the unconstitutional behavior that Title VII was designed to prevent. *See id.* at 2170.

The lack of congressional findings addressing same-gender sexual harassment in Title VII is not an inadvertent omission. Just as opposite-gender sexual harassment is understood as a subset of discrimination because of gender, see *Schoiber*, 941 F. Supp. at 739 & n.13, same-gender sexual harassment, or much of it, is best understood as a subset of discrimination because of sexual orientation. In addition to cases of explicit same-gender sexual harassment because of sexual orientation, see *Dillon v. Frank*, No.90-2290, 1992 WL 5436, at *4-5, (6th Cir. Jan. 15, 1992), as discussed in Section IIB of this brief, all cases involving homosexual harassers and gender-stereotyping involve a conflation of gender and sexual orientation that inherently and primarily implicates the latter.

Creation of a workplace hostile to a gender is not equivalent to creating a workplace hostile to sexual orientation. Furthermore, creation of such a *federal* cause of action would require specific congressional findings and legislation.

The failure of Congress to legislate in this area is not a matter of oversight. Congress has repeatedly refused to legislate a remedy for sexual orientation discrimination. *See Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) (observing that Congress "has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws"); *Ulane*, 742 F.2d at 1085 n.11 (citing bills presented in 1974, 1975, 1977, 1980 and 1982); Employment Non-Discrimination Act (ENDA) of 1994, S. 2238, 103d Cong. (1994); ENDA, S. 2056, 104th Cong. (1996) (rejected by 49-50 Senate vote, *see* 142 CONG. REC. S10129-39 (daily ed. Sept. 10, 1996)).[8] Thus, a decision to discharge an employee made because

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[8] Proponents of legislation to extend Title VII's protection to prohibit discrimination based on sexual orientation have admitted the lack of federal statutory protection for gays and lesbians. *See, e.g.*, 142 CONG. REC. S10057 (daily ed. Sept. 9, 1996) (remarks of Senator Edward Kennedy in support of ENDA) ("Although we know that the problem exists, there are no rules, regulations, or laws to protect people."). The courts of appeals agree that "because of gender" in Title VII does not mean "because of sexual orientation." *See Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (collecting cases); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal.1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978).

of the decisionmaker's anti-homosexual animus is outside the statutory ambit of Title VII – no matter how repugnant to meritocratic ideals such an employment decision is.

If Congress were to amend Title VII to include a prohibition on discrimination because of sexual orientation, same-gender sexual harassment would be included as a type of discrimination in the same way that opposite-gender sexual harassment is included under Title VII as a type of gender discrimination. The most recent version of ENDA proposes the very invocation of congressional power over this area that is presently conspicuously absent from Title VII. *See* 143 CONG. REC. S5458 (daily ed. June 10, 1997) (one of the purposes of bill seeking enactment of ENDA is "to invoke congressional powers, including the powers to enforce the 14th amendment to the Constitution and to regulate commerce, in order to prohibit employment discrimination on the basis of sexual orientation."). Lacking grounding in Title VII's language, its purpose, or the equal employment opportunity principle that informs the statute, same-gender sexually harassing conduct should remain a subject of state tort law and not be converted into an issue of federal concern. Any other result would torture the meaning of Title VII's prohibition of sex discrimination and set the statute adrift from its moorings.

II. THE FIFTH CIRCUIT CORRECTLY HELD THAT MALE-ON-MALE HARASSMENT IN AN ALL-MALE WORK SETTING IS NOT ACTIONABLE UNDER TITLE VII SIMPLY BECAUSE THERE ARE SEXUAL OVERTONES TO THE HARASSMENT.

The Court in *Meritor* tethered sexual harassment as a cause of action for gender discrimination to Title VII by recognizing that harassment because of gender could alter the terms and conditions of employment in a way that Title VII prohibits. This case illustrates that the sexual content alone of sexually harassing conduct is not enough to maintain this critical connection to the statute. And, because all same-gender sexual harassment has only sexual content, and nothing to suggest discrimination because of gender, no such harassment is prohibited by Title VII.

A. The Sexual Content Alone of Sexual Harassment is Not Enough to Raise a Fact Issue of Discrimination Because of Gender.

The Court in *Meritor* held that, "when a supervisor *sexually* harasses a subordinate *because of the subordinate's sex*, that supervisor 'discriminate[s]' on the basis of sex [under Title VII]." 477 U.S. at 64 (emphasis added.) The phrase "because of the subordinate's sex" in this statement from the *Meritor* opinion would have been redundant had the Court concluded that sexual harassment is always discrimination because of gender. *Accord Barnes v. Costle*, 561 F.2d 983, 989 n.49 (D.C. Cir. 1977) (holding, in the first decision by a circuit court recognizing Title VII

claim for sexual harassment, that "[t]he vitiating sex factor thus stemmed not from the fact that what appellant's superior demanded was sexual activity – which of itself is immaterial – but from the fact that he imposed upon her tenure in her position a condition which ostensibly he would not have fastened upon a male employee") (emphasis added); EEOC COMPLIANCE MANUAL (CCH) § 615.3(a) ("Sexual harassment is sex discrimination not because of the sexual nature of the conduct to which the victim is subjected but because the harasser treats a member or members of one sex differently from members of the opposite sex."). Thus, in recognizing opposite-gender sexual harassment as actionable under Title VII, the Court did not create a stand-alone cause of action for unwelcome sexuality in the workplace.

Meritor's endorsement of the holding in *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), that "under certain circumstances the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII," *id.* at 901, likewise indicates that proof of discrimination "because of gender" is an essential element of a Title VII sexual harassment claim. *See Meritor*, 477 U.S. at 66-67 (quoting *Henson*, 682 F.2d at 902). The *Henson* court observed that not "every instance of sexual harassment gives rise to a Title VII claim against an employer for a hostile work environment," 682 F.2d at 903, and went on to outline the elements that a plaintiff must show to establish her claim, including proof that the employee was subject to unwelcome sexual harassment, and that the harassment complained of was based upon sex. *See id.* at 903-904.

Like the Eleventh Circuit in *Henson*, almost all the circuits include the dual requirements of (1) unwelcome conduct of a sexual nature, and (2) harassment based upon sex, as elements of a hostile environment sexual harassment claim under Title VII. *See Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525, 540 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996); *Swentek v. USAIR*, 830 F.2d 552, 557 (4th Cir. 1987); *Jones v. Flagship Int'l*, 793 F.2d 714, 719 (5th Cir. 1986); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619 (6th Cir. 1986); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988); *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 797 (10th Cir. 1997), *petition for cert. filed*, No. 97-5642 (U.S. Aug. 11, 1997); *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 649 (6th Cir. 1986); *see also King v. Hillen*, 21 F.3d 1572, 1580 (Fed. Cir. 1994) ("Sexual harassment will lie if the offensive conduct is based on the employee's sex, is unwelcome, and is sufficiently severe."); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (any harassment, whether with clearly sexual overtones or not, "that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII").[9]

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[9] The Ninth Circuit, cited by Amici Lambda Legal Defense Fund, et al., is the only circuit that does not explicitly include "because of sex" as an element in hostile work environment sexual harassment cases, see, *e.g.*, *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995). Significantly, that court has not yet issued an opinion applying its elements to a same-gender sexual harassment claim.

1. No courts allow an automatic inference of discrimination because of gender in same-gender sexual harassment cases.

Many courts when faced with an opposite-gender harassment claim under Title VII infer that the sexually harassing conduct occurred "because of gender."[10] Given that the context of the opposite-gender exchange implicates the purpose of the statute, this makes sense. Typical of this approach is that taken by the Third Circuit, which requires that employees establish, as an element of a Title VII hostile environment sexual harassment claim, that "the employees suffered intentional discrimination because of their sex," *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 860 (3d Cir. 1990), but has also suggested in an opposite-gender case that "[t]he intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990).[11] As one court has explained:

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[10] The Eleventh Circuit in *Henson* noted that the inference should not always be drawn in opposite-gender cases. For instance, in "cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers," "the sexual harassment would not be based upon sex because men and women are accorded like treatment," and no Title VII remedy would be available. 682 F.2d at 904.

[11] It should be noted that the Third Circuit, like the Ninth Circuit, has yet to decide a case asserting same-gender sexual harassment under Title VII.

> The distinction [between "sex" and "sexual" purposes of satisfying Title VII's requirement "because of gender" of discrimination] makes little difference when dealing with male-on-female or female-on-male sexual harassment; at least, it has typically been treated as one and the same. When a man touches a woman in a sexual manner, or asks her to have sexual relations with him, it can be presumed that he is doing so because she is a woman. Her gender is probably not incidental. It is only with same-sex harassment that the distinction becomes very important.

Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1181 (N.D. Ind. 1995).

Virtually all courts that have addressed same-gender sexual harassment claims have refused to draw an automatic inference of discrimination because of gender when faced with a Title VII claim involving same-gender sexually harassing conduct. In *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), the Seventh Circuit was forced to recognize that:

> this ["because of gender"] requirement has not detained courts long in cases of opposite-sex harassment; it is generally taken as a given that when a female employee is harassed in explicitly sexual ways by a male co-worker or workers, she has been discriminated against "because of" her sex. But courts by and large have been unwilling to make the same assumption when a man harasses another man in the workplace, however rife the harassment may be with sexual innuendo, sexual contact, and other conduct of an explicitly sexual nature. They have looked instead for proof, above and

> beyond the sexual content of the harassment itself, that the plaintiff was singled out for harassment because of his gender.

Id. at 574-75 (citations omitted); *see* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 723 (1997) [hereinafter *What's Wrong*] ("Unlike the different-sex cases, in same-sex cases brought under Title VII most courts demand that the plaintiff show something more than that the conduct was unwelcome and of a sexual nature.").[12] That courts decline to draw an inference in these cases is consistent with the failure of same-gender harassment to implicate the purpose of Title VII.

2. Only the Seventh Circuit has gone so far as to suggest that sexual content alone raises an inference of discrimination because of gender – and the Seventh Circuit later retreated.

The Seventh Circuit is the only court that has addressed directly the question whether the sexual content of same-gender harassment can raise a fact issue

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[12] Compare *Katz v. Dole*, 709 F.2d 1251, 1255 (4th Cir. 1983) (in opposite-gender sexual harassment case, sexual nature alone of harassing conduct almost always will represent an "intentional assault") *with McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1995) (same circuit holding in same-gender sexual harassment case that claim was not actionable because both claimant and the harasser were heterosexuals and holding "result [was] compelled by a common sense reading of the critical causation language of the statute: *'because of the [claimant's] sex.'* ").

under Title VII. In *Doe*, the panel majority, having recognized that the presumption of gender-based discrimination drawn in opposite-gender cases is not imported to same-gender sexual harassment by other courts, went on to question why the sexual content of the conduct should not be enough:

> It is not clear why such proof [that the plaintiff was targeted for harassment because of his gender] is needed when the harassment has explicit sexual overtones, however. Arguably, the content of that harassment in and of itself demonstrates the nexus to the plaintiff's gender that Title VII requires. . . . This view is consistent with the EEOC's guideline, which does not focus on whether the harasser singled out the victim on the basis of her gender, but instead provides simply that "verbal or physical conduct of a sexual nature constitute[s] sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

119 F.3d at 574-75 (quoting 29 C.F.R. § 1604.11). In a bold conclusion, the majority attempted to avoid applying the statute as written by Congress and interpreted by the Court, stating: "We view with considerable skepticism, therefore, the notion that same-sex harassment that is overtly sexual and sex-based is only sex discrimination when the plaintiff can produce proof that the harasser chose him specifically *because he is male.*" *Id.* at 580 (emphasis added). Thus, where *Meritor* expressly grounded the sexual harassment cause of action in Title VII's fundamental purpose as a protection against gender

discrimination, *Doe* severed the required connection by recognizing same-gender sexual harassment based solely on the sexual content of the harassing conduct and thereby reducing Title VII to a per se rule prohibiting all sexual conduct in the workplace.

The *Doe* majority ultimately did not rest its holding entirely on its per se rule. Rather, in holding that the plaintiffs raised a fact issue under Title VII, it also relied on evidence of gender-stereotyping comments that clearly imply sexual orientation discrimination. *See Doe*, 119 F.3d at 568 (reversing summary judgment that district court based on *Ulane*'s holding that Title VII does not afford protection from sexual orientation discrimination).

Just one month and a day after *Doe*, in *Johnson v. Hondo*, No. 96-3492, 1997 WL 541952 (7th Cir. Aug. 28, 1997), the Seventh Circuit decided the claims of another plaintiff seeking redress under Title VII for same-gender-sexually-charged conduct. The *Hondo* panel affirmed the district court's summary judgment in favor of the employer on the plaintiff's Title VII sexual harassment claim. Acknowledging that this holding "may appear at first blush to be in some tension with the analysis in *Doe*," *id.* at *4, the panel distinguished *Doe*, but not on the basis that the conduct complained of by the plaintiff in *Hondo* somehow differed in sexual content. *Hondo*'s holding indicates that the Seventh Circuit has conceded that sexual content alone is not enough to raise an inference that same-gender harassing conduct occurred "because of

gender."[13] Furthermore, although the *Hondo* panel attempted to distinguish the facts in *Doe* on the basis of so-called gender-stereotyping harassment in that case, the only principled way to reconcile the two cases is on the grounds that the *Hondo* panel realized that the *Doe*

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[13] Tacitly recognizing that only the sexual nature of the conduct at issue here could raise a fact issue of gender discrimination, Oncale and amici broadly embrace *Doe's* suggestion that the sexual content alone of same-gender harassing conduct is enough to raise a fact issue on this element to survive summary judgment. *See* Pet. Br. at 23; Brief of Law Professors as Amici Curiae in Support of Petitioner ("Law Prof. Br.") at 18 (criticizing the Fifth Circuit for "demand[ing] . . . that the sexual harassment plaintiff show that he or she was treated 'differently because of his [or her] sex'"); Brief of Lambda Legal Defense and Education Fund, et al., as Amici Curiae in Support of Petitioner ("Lambda Br.") at 5-8 (arguing that victims of sexual harassment experience the sexual content of the conduct in different ways depending on whether they are a man or woman), Brief Amicus Curiae of the National Employment Lawyers Association in Support of Petitioner ("NELA Br.") at 19-20. Amici The National Organization on Male Sexual Victimization, Inc., et al. argue that male-on-male sexually harassing conduct relates to male aggression and dominance in society and therefore relates tangentially to the subordination of women by men. Alternatively, they contend that Title VII should reach the subordination of men by men simply because it is subordination. *See* Brief of National Organization on Male Sexual Victimization, Inc., et al. as Amici Curiae in Support of Petitioner ("NOMSV Br.") at 7-11. At best, such arguments merely maintain that male harassers harass because *they* are male, which does not mean their behavior was caused by the gender of their victims pursuant to Title VII. At worst, these arguments suggest that the purpose of Title VII is to deconstruct and reshape some collective male psyche. *See What's Wrong*, at 768 ("Title VII should not be the vehicle by which we dismantle every hypermasculine or hyperfeminine microculture.").

majority had imported a cause of action for sexual orientation discrimination into Title VII.

3. The EEOC also recognizes that sexual content alone is not enough.

As the Eleventh Circuit made clear in *Henson*, the EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11, about which there is much discussion in the briefs filed in this case, do not pretend to provide a comprehensive explanation of the elements a plaintiff must prove to prevail on a sexual harassment claim. They define only part of the plaintiff's prima facie case. *See What's Wrong*, at 719 (observing that the EEOC Guidelines on gender-based harassment interpret only two of the five elements of the plaintiff's prima facie case as outlined in *Henson*).

The EEOC Compliance Manual, which fills in these gaps in the Guidelines, makes clear that, true to the statutory language, opposite gender sexual harassment for Title VII still requires proof of discrimination "because of gender." *See* EEOC COMPLIANCE MANUAL (CCH) § 615.2(b)(3) (1987) (observing that, even in same-gender sexual harassment cases, "the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex"); *id.* § 615.3(a) ("Sexual harassment is sex discrimination not because of the sexual nature of the conduct to which the victim is subjected but because the harasser treats a member or members of one sex differently from members of the opposite sex."); *id.* § 615.6(a) ("[S]ome forms of verbal conduct (such as specific words or some jokes) may

involve sex or sexuality without discriminating on the basis of sex. That is, such conduct does not treat one sex more or less favorably than the other sex. Without such disparate treatment, unwelcome verbal conduct of a sexual nature is not sex discrimination and consequently, cannot be sexual harassment [prohibited by Title VII]."). Thus, the EEOC, like the courts, recognizes that discrimination "because of gender" is a necessary element of a Title VII sexual harassment claim.

4. The conduct complained of here has only sexual content and nothing to suggest discrimination because of gender.

Oncale's factual allegations state a case of male-on-male sexually charged hazing in the workplace. Unlike the sexually charged hazing in *Quick* and *Goluszek*, the conduct in this case occurred in an all-male environment, precluding any comparative evidence that could prove discrimination because of gender. Thus, as in *Quick* and *Goluszek* – and every other case of sexually charged male hazing, horseplay, or ritual – the sexual content alone does not raise an inference that the conduct occurred because of the victim's sex.

The Fifth Circuit previously refused to allow a Title VII harassment claim when faced with similar allegations of male hazing behavior on an offshore oil rig. In *Vaughn v. Pool Offshore Co.*, 683 F.2d 922 (5th Cir. 1982), Vaughn, an offshore oil rig roustabout, claimed hostile environment racial harassment under Title VII and 42 U.S.C. § 1981. About a month after Vaughn began working he was:

> subjected . . . to a practice known as "doping" or "hazing." He was seized by other Pool employees, stripped, and had his genitals covered with grease. Vaughn [also] suffered the indignities of being doused with cold water or ammonia while showering, having the lights cut off while bathing, and having hot coffee poured in his back pocket.

Id. at 923. Vaughn's co-workers used racial slurs, including remarks that the district court found could not be regarded as harmless. *Id.* at 924. Vaughn claimed the racially charged atmosphere compelled him to quit his job. *Id.* at 923.

The Fifth Circuit affirmed the district court's summary judgment in favor of the employer on Vaughn's Title VII claim. *Id.* The court noted that Vaughn was employed as a roustabout, and that, on an off-shore oil platform, "[r]oustabouts occupied the lowest rung on the Rig's employment ladder." *Id.* The court also observed that during a crew's seven days on duty, "they lived and worked together within the restricted confines of the offshore platform. Life in these close quarters was, by all accounts, rowdy and rough. Raw pranks, crude practical jokes and verbal abuse abounded, some of it permeated with racial overtones." *Id.* As to the genital assault on Vaughn, the court stated in a footnote:

> It would appear that this treatment was frequently accorded, as a seeming rite of passage, to new offshore rig workers. The white toolpusher was "doped" twice. Others confirmed the same experience. Color played no part in

> selection of the subjects of this oil patch pastime.

Id. at 923 n.1.

In deciding the Title VII issue, the Fifth Circuit stated that "[t]he question in this case is whether the harassment Vaughn experienced resulted from an environment 'polluted with discrimination' or from an atmosphere replete with instances of humiliating acts shared by all. *Id.* at 924 (quoting *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)). "The district court held the summary judgment evidence showed only the latter, concluding that the hazing and practical joking should be viewed realistically as male interaction and not atypical of the work environment involved." *Id.* Finding that ample evidence supported the conclusion that nearly all the rig employees were victims of the pranks at one time or another, and that Vaughn did not believe his treatment was racially motivated, the Fifth Circuit affirmed the district court's summary judgment. *Id.* at 925.

In *Vaughn*, the plaintiff's hazing was accompanied by racially offensive slurs but the plaintiff recognized and the Fifth Circuit determined that no Title VII racial discrimination had occurred. *Id.* Like the plaintiff in *Vaughn*, Oncale, according to his own allegations, was the victim, along with other co-workers, of male hazing in an all-male environment.[14] While the conduct, if it occurred as

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[14] Because Oncale has not produced evidence raising a fact issue that the alleged harassment occurred because of gender, his Title VII sexual harassment claim fails as a matter of law

alleged, presumably violated Louisiana state tort law, it is not actionable under Title VII as discriminatory sexual harassment. Similarly, there is no evidence here of discrimination because of gender. The sexual content of the conduct here does not raise an inference of discrimination because of gender, and that is all that Oncale can point to in his effort to reverse the trial court's summary judgment.

Thus, the Fifth Circuit correctly disposed of Oncale's sexual harassment claim as a matter of law for several reasons. First, Oncale's allegations state merely a claim of male-on-male harassment with sexual overtones in an all-male environment. *See Giddens v. Shell Oil*, No. 92-8533, slip op. at 2 (5th Cir. Dec. 6, 1993) ("male-on-male sexual harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex"). Second, Oncale's allegations fail to raise a fact issue as to the existence of anti-male bias. *See Garcia v. Elf Atochem North Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (citing *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988)). Finally, to the extent the Fifth Circuit has adopted a per se rule precluding all same-

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regardless of whether it is analyzed as a hostile environment case or a quid pro quo case. Furthermore, although Oncale suggests that his allegations might state a case of quid pro quo harassment, the summary judgment record is devoid of any evidence that Oncale's alleged harassers attempted to "extort sexual consideration" from him or "condition employment benefits on sexual favors" from him. Because there is no fact issue under this additional element of a quid pro quo claim, Oncale's suggestion that he states such a claim fails for that reason as well. *See Jones v. Flagship Int'l*, 793 F.2d 714, 722 (1986).

gender sexual harassment cases under Title VII, the court correctly refused to convert Title VII into a generalized workplace behavior statute. *See Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 737 (N.D. Ill. 1996).

B. Same-Gender Sexual Harassment Has Only Sexual Content and Nothing to Suggest Discrimination Because of Gender.

Courts allowing same-gender sexual harassment actions to survive summary judgment do convert Title VII when they literally comply with the statutory language by relying on purported showings of discrimination because of gender. The courts' inquiries devolve into discrete categories: harasser's homosexual orientation, gender stereotyping, and comparative evidence in workplace misconduct cases involving a dual-gender working environment. *See, e.g., Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1505 (11th Cir. 1997) (male harasser who only sexually harassed men due to homosexual orientation), *petition for cert. filed*, 66 U.S.L.W. 3170 (Aug. 20, 1997); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (same); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (same); *Doe v. City of Belleville*, 119 F.3d 563, 575-77 (7th Cir. 1997) (considering taunts directed at boy with earring as gender stereotyping); *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1379 (8th Cir. 1996) (comparative evidence showing men treated worse than women at workplace by virtue of men being grabbed or poked in the testicles by other men, i.e., "bagged"); *see also Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 808 (N.D. Ind. 1995) (allowing same-gender action to survive 12(b)(6) motion based on theoretical

possibility of proving gender-biased atmosphere). These categories track the literal language of the statute, but do not bring along with that statutory language its meaning derived from the purpose of Title VII. The categories inevitably fail to prove discrimination because of gender under Title VII. Rather, these categories ultimately reveal that same-gender sexual harassment is mere workplace misconduct and/or sexual orientation discrimination.

1. Same-gender sexual harassment is mere workplace misconduct with sexual overtones.

If the cases filed to date in the federal courts are any indication, much of same-gender sexual harassment occurs, as it did here and in *Vaughn*, between males. Male heterosexuals might harass each other with sexually-charged conduct for any number of reasons unrelated to what the lower courts have considered "because of [the harassee's] gender." *See Doe*, 119 F.3d at 604 (Manion, J., concurring in part and dissenting in part) ("The difficulty of proving discrimination because of the person's sex stems from the reality that when a man harasses another man it is very unlikely that he is doing so because the victim is a man.").

As amici point out: "Men sexually abuse . . . men, typically on the basis of their status as men of a particular age; physical stature; ethnicity; race; disability . . . that makes them attractive for, or vulnerable to, male sexual aggression." NOMSV Br. at 9-10 (record citations and cases omitted); *see also What's Wrong*, at 697-98 (In such cases, "[r]ather than sexually objectifying the plaintiff, the harasser engages in sexual behavior that is designed

to or has the effect of making the plaintiff annoyed, uncomfortable, offended, humiliated, intimidated, or otherwise victimized by the [harasser's] conduct.").

Male heterosexuals' sexually harassing conduct towards other males could be hazing or some other type of male ritual behavior. *See, e.g., Seamons v. Snow*, 84 F.3d 1226, 1230 (10th Cir. 1996) (sexual assault of high school football player by five of his upper-class teammates while other teammates looked on); *Skinner v. City of Miami*, 62 F.3d 344, 346-47 (11th Cir. 1995) (plaintiff firefighter sustained injuries when fellow firefighters engaged in alleged "horseplay and hazing" involving sexual assault), *cert. denied*, 117 S. Ct. 1425 (1997)[15]; *Quick*, 90 F.3d at 1374 ("bagging").

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[15] Documented reports can be found concerning sexual content male hazing in a number of settings, including the military, see Kingshott, *Military Harassment Costs Could Hit $1 Billion A Year*, San Antonio Exp. News, Feb. 13, 1997 (Male-on-male sexual harassment takes "the form of hazing during training. 'A lot of this is going on in the military,' Farley said, 'and a lot of this is sexual in nature with heterosexuals harassing other heterosexuals during non-duty hours. It's a power thing. . . . You're the new person and you have to go though this because we did."); the high school football locker room, see *McAteer Principal Gets Some Support*, S.F. Chron., Feb. 10, 1988, 1988 WL 6106192 (high school principal suspended for handling of hazing incident during which a football team member was pinned on the locker room floor and poked from behind with a broomstick and later needed stitches to close his lacerated scrotum); and college fraternities, see *Hope College Fraternity Caught For Alleged Hazing*, Fraternity Newsletter, June 1988, at 8 (pledges required to wear only jock straps and were burned lightly with matches); *Hazing Had Parallel Among Primitive People*, Sci. Digest, Jan. 1961 at 23 (initiates forced to spray paint

Equating Title VII's inclusion of "sex" with "sexual" contravenes the language and purpose of the statute and only confuses the issues.[16] Noting that with same-gender harassment "the distinction becomes very important," the court in *Vandeventer v. Wabash National Corp.*, 887 F. Supp. 1178 (N.D. Ind. 1995), aptly stated:

> [t]he words 'sex' and 'sexual' create definitional problems because they can mean either 'relating to gender' or 'relating to sexual/reproductive behavior.' The two are not the same, but are certainly related and easily confused. Title VII only recognizes harassment *based* on the first meaning, although that frequently *involves* the second meaning. However, harassment which involves sexual behavior or has sexual behavior overtones (i.e., remarks, touching, display of pornographic pictures) *but is not based on* gender bias does *not* state a claim under Title VII.

Id. at 1181 (emphasis in original); *see also Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749 n.1 (4th Cir. 1996) ("Indeed, the use of 'sex' and 'gender' interchangeably [in Title VII cases] may impose a useful limit

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their bodies and walk publicly in clothing of opposite sex); *The Netherlands: Night of the Pig*, TIME, Nov. 9, 1962 at 35 (initiates crammed naked into room with over 230 other underclassmen and drenched with beer while upperclassmen walked on their heads), *cited in* Darryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 MISS. L.J. 111, 116 n.23 (1991) (discussing "the reality that hazing is a common occurrence in all segments of American life").

[16] In *Meritor*, the Court interpreted the meaning of Title VII's prohibition of discrimination in the "terms, conditions, or privileges" of employment; *Meritor* did not, however, expand the meaning of "sex." *See* 477 U.S. at 65-66.

on the term 'sex,' which otherwise might be interpreted to include sexual behavior."), *cert. denied*, 117 S. Ct. 70 (1996); *Doe v. City of Belleville*, 119 F.3d 563, 604 (7th Cir. 1997) (Manion, J., concurring in part and dissenting in part) (describing the difference between " 'sex,' as used in the statute to mean a biological fact, and 'sexuality,' as used by the court to mean sexual overtones, sexual content, sexual character, and so on.").

2. Same-gender sexual harassment is discrimination because of sexual orientation.

Alternatively, same-gender sexual harassment may be a product of one or the other party's homosexual orientation. Courts inevitably merge gender and sexual orientation when they conclude that a "homosexual harasser" can sexually harass a person of the same gender in violation of Title VII. Inquiring into the sexual orientation of an alleged harasser as a means of raising a fact issue of discrimination because of gender necessarily conflates gender and sexual orientation.

For the same reasons that Title VII does not redress discrimination because of sexual orientation, the homosexual orientation of either or both individuals in a same-gender sexual harassment case does not raise an inference of "because of gender" discrimination. *See Miller v. Vesta, Inc.*, 946 F. Supp. 697 (E.D. Wis. 1996) (declining to consider the alleged harasser's homosexuality in determining whether plaintiff raised a fact issue on her hostile environment claim because plaintiff's heterosexuality, as

a sexual orientation, is not a protected characteristic under Title VII).[17]

The conflicting results in same-gender sexual harassment cases involving so-called "homosexual harassers" and "heterosexual harassers" reveal an incoherency that derives from this confusion of sexual orientation with gender. *Compare Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996) (Title VII sexual harassment claim survived dismissal based on allegations that homosexual male employees pressured heterosexual male employees to engage in homosexual sex and subjected them to numerous graphic and sexually explicit remarks containing descriptions of homosexual sex, as well as sexually provocative physical contact), *with Carreno v. IBEW Local No. 226*, 1990 WL 159199 (D. Kan. 1990) (homosexual man who was subjected by his heterosexual male co-workers to epithets such as "Mary" and "faggot," and having his genitals and buttocks caressed, did not plead a prima facie case of sexual harassment under Title VII because harassment was not because of his gender, even though plaintiff expressly stated he was not asserting a claim of sexual orientation discrimination), *and Dillon v. Frank*,

[17] Symmetry is achieved *and* the purpose of Title VII is satisfied by the recognition of female-on-male sexual harassment claims. Moreover, any contention that heterosexuals may be disproportionately affected by a refusal to redress same-gender sexual harassment claims does not suggest a different result under Title VII. *See DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (dismissing disparate impact claim based on allegations that discrimination against homosexuals disproportionately affects men).

1992 WL 5436 (6th Cir. 1992) (homosexual plaintiff's allegations of sexual harassment by heterosexual male co-workers, including taunts of "fag," "Dillon sucks dick," and physical assaults, were not because plaintiff was male, but rather because he was homosexual). Regardless whether the harasser or the victim is homosexual, Title VII does not extend to same-gender sexual harassment.

Courts likewise meld gender discrimination and discrimination because of sexual orientation when they conclude that gender stereotyping in the context of same-gender harassment amounts to discriminatory sexual harassment in violation of Title VII. Courts and amici in this case have misconstrued the Court's decision in *Price Waterhouse* as supporting the notion that gender stereotyping is *per se* gender discrimination. *See Doe v. City of Belleville*, 119 F.3d 563, 580-82 (7th Cir. 1997).[18] As the Court explained in *Price Waterhouse*, "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision." 490 U.S. at 251; *see also Doe*, 119 F.3d at 607 (Manion, J., concurring in part and dissenting in part) (disagreeing with the panel majority's broad reading of *Price Waterhouse*); *Dillon*, No. 90-2290, 1992 WL 5436, at *9-10 (distinguishing *Price Waterhouse* and refusing to apply Title VII to same-gender sexual harassment claim based on gender-stereotyping comments).

[18] *See also* Lambda Br. at 8-9; Law Prof Br. at 3, 16-17; NOMSV Br. at 10.

The use of gender-stereotyping remarks would swallow whole the oft-rejected congressional proposal to prohibit sexual orientation discrimination under Title VII. *See* S. 869, 143 CONG. REC. S5458 (daily ed. June 10, 1997) (proposed legislation (ENDA) to redress discrimination in employment because of real *or perceived* sexual orientation). Consequently, such gender stereotyping comments should not yield a fact issue on whether the harassment was because of gender.

CONCLUSION

Oncale's allegations do not support the conclusion that he was subjected to discrimination because he is a man as required for actionable sex discrimination under Title VII. While male-on-male hazing in an all-male environment presumably states a claim under any number of state law theories or statutes, it does not state a claim under Title VII. In recognizing opposite-gender sexual harassment as a form of sex discrimination, the Court did not create a stand-alone cause of action for unwelcome sexuality in the workplace. To allow Oncale's claim to survive summary judgment would require the Court to hold that the sexual content alone of harassing conduct raises an inference of discrimination because of gender. Such a holding would read the words "because of sex" out of the statute, unmoor sexual discrimination under Title VII from the statute's principle and purpose, and convert Title VII into a workplace tort statute.

For these reasons, the Court should affirm summary judgment in this case and hold that Oncale's claim is not cognizable under Title VII.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOSEPH ONCALE,

Petitioner,

v.

SUNDOWNER OFFSHORE SERVICES, INC., et al.,

Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. TITLE VII APPLIES TO SAME-SEX DISPARATE TREATMENT

Respondents acknowledge that the Title VII prohibition against gender based discrimination protects men as well as women. (R.Br. 12). Respondents also agree that ordinarily the Title VII prohibition against gender-based discrimination will apply even where the employee who took the allegedly gender-based action was of the same sex as the asserted victim. "Title VII supports a cause of action for discriminatory decisionmaking in employment regardless [of] whether the decisionmaker is the same gender as the claimant." (R. Br. 11-12). The central contention advanced by respondents is that harassment[1], or at least sexual harassment, is somehow different from other forms of discrimination.

Respondents evidently do not deny that if a male supervisor denied a promotion to, demoted, fired, or reduced the pay of a male subordinate, because of that subordinate's

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[1] The gender-related harassment cases in the lower courts fall into four distinct categories: (1) facially neutral harassment targeted at a victim on account of his or her gender (e.g hitting an employee; haranguing an employee as incompetent), (2) facially gender-based but non-sexual harassment (e.g. denigrating women as incompetent; use of gender-specific epithets), (3) facially sexual harassment (e.g. unwelcome sexual advances), and (4) quid pro quo sexual demands. The appropriate method of analysis and proof may vary to some degree depending on the type of harassment involved.

gender, those facts would state a claim under Title VII[2]. Indeed, in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), no member of the Court thought it was an obstacle to Paul Johnson's Title VII claim that the supervisor who had made the disputed promotion decision, James Graebner, was a man.[3] If an employer made a "discriminatory decisio[n]" to give women or men preferential treatment in their choice of shift, vacation days, or offices, that distinction would fall within the statutory prohibition; respondents do not suggest that it would matter in such a case whether the supervisor or manager who adopted the policy was a man or a woman. But, according to respondents, the same male supervisor who could not, on account of gender, dismiss or demote a male worker, could legally harass that same worker in a facially neutral or even facially discriminatory manner.

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[2] In some narrow circumstances Title VII permits an employer to consider the gender of an employee or applicant in making an employment decision. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987)(affirmative action); *Dothard v. Rawlinson*, 433 U.S. 321 (1977)(bona fide occupational qualification); *see Wittmer v. Peters*, 87 F. 3d 916 (7th Cir. 1996), *cert. denied* 117 S.Ct. 949 (1997)(race may be considered among other relevant circumstances where it is indisputably relevant to applicant's ability to perform job duties).

[3] The lower courts have repeatedly upheld Title VII claims where the plaintiff and the official responsible for the disputed decision were of the same gender. *Eg. Wilson v. Bailey*, 934 F. 2d 301 (11th Cir. 1991); *Veatch v. Northwestern Memorial Hospital*, 730 F. Supp. 809 (N.D.Ill. 1990); *see Blalock v. Metals Trades, Inc.*, 775 F. 2d 703, 708 (6th Cir. 1985)(alleged discrimination against a Christian by another Christian); *Hansborough v. City of Elkhart Parks and Recreation Dep't*, 802 F.Supp. 199, 201, 206 (N.D.Ind. 1992)(alleged discrimination against black individual by another black individual).

Nothing in the language of Title VII, and nothing in this Court's equality jurisprudence, supports such a distinction. Section 703(a) provides in part, "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's* . . . sex". (Emphasis added). Being subjected to harassment is an undesirable "condition of employment", like working in the dirty part of a factory or being required to handle dangerous chemicals. The plain language of the statute refers only to the sex of the *victim* of the alleged unlawful act; the statute makes no mention whatever of the sex of the individual who perpetrated that act.[4] Equally importantly, section 703(a) on its face makes no distinction between harassment and any other form of discrimination.

Many types of harassment are indistinguishable in their intent and selectivity from a discriminatory decision to fire a woman because of her gender; respondents offer no explanation as to why, where the perpetrator and victim are of the same gender, one such decision would violate Title VII, while the other gender-based decision would be entirely legal. It is unclear whether respondents claim that an employer would be immune from suit under Title VII if the employer orchestrated a campaign of harassment against women workers, or chose to protect only men, but not women, from harassment, so long as the company official who adopted that discriminatory policy were a woman. Respondents apparently

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[4] *Doe v. City of Belleville, Illinois*, 119 F. 3d 563, 569 ("Title VII on its face draws no distinction between men and women, either as plaintiffs or harassers"), 572 ("The language of Title VII . . . does not purport to limit who may bring suit based on the sex of either the harasser or the person harassed")(7th Cir. 1997).

do contend that Sundowner could legally adopt a formal written rule such as "It shall be the responsibility of all female employees to harass any woman who takes a traditionally male job." Similarly, by exploiting respondents' proposed exemption for same-sex harassment, an employer could lawfully pursue an expressly selective anti-harassment policy, such as "Sexual harassment of men will lead to automatic dismissal; sexual harassment of women holding construction jobs will not be punished so long as the perpetrators are women". Either such policy could drive women from the jobs in question as effectively as a deliberate decision to fire them because of their gender[5].

The decision of a supervisor or fellow employee to harass a particular victim is indistinguishable from the sort of promotion or dismissal decisions whose illegality respondents concede. Respondents offer no explanation of why Title VII applies to a male supervisor who demotes or reduces the salary of a male worker, but not to that same supervisor if he harasses that identical employee. At times harassment is motivated by a specific desire to drive an employee from a particular position; that is a problem which women have historically faced when they obtain construction trade, craft

[5] The lower courts are in agreement that discriminatory harassment would constitute constructive discharge where it is so severe that a reasonable person would have been compelled to resign. *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 705 (7th Cir. 1993); *McCann v. Litton Sys., Inc.*, 986 F. 2d 946, 951 (5th Cir. 1993); *Acrey v. American Sheep Indus. Ass'n*, 981 F. 2d 1569, 1573-74 (10th Cir. 1992); *Aviles-Martinez v. Monroig*, 963 F. 2d 2, 6 (1st Cir. 1992); *Gray v. York Newspapers, Inc.*, 957 F. 2d 1070, 1079 (3d Cir. 1992); *Wilson v. S & L Acquisition Co.*, 940 F. 2d 1429, 1436 (11th Cir. 1991); *Wilson v Firestone Tire & Rubber Co.*, 932 F. 2d 510, 515 (6th Cir. 1991); *Sanchez v. City of Santa Ana*, 915 F. 2d 424, 431 (9th Cir. 1990), *cert. denied*, 502 U.S. 815 (1991).

and other jobs traditionally held by men.[6] Title VII forbids an employer from taking an adverse action against an employee because she or he fails to conform to some stereotype regarding how women or men should act, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); in some harassment cases the victim is targeted by fellow workers precisely because he or she did not conform to such a stereotype.[7] Gender-based harassment need not be sexual in content; where a victim has been targeted because of his or her gender, even gender-neutral practices[8] will be actionable where they bring about a

[6] *Eg. Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1493-94, 1495 (M.D.Fla. 1991)(welder at shipyard); *Andrews v. City of Philadelphia*, 895 F. 2d 1469 (3d Cir. 1990)(police officer); *Hall v. Gus Construction Co., Inc.*, 842 F. 2d 1010 (8th Cir. 1988)(road construction worker).

[7] *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F. 3d 1191 (4th Cir.), *cert. denied* 117 S.Ct. 72 (1996); *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D.Ill. 1988). The Seventh Circuit noted in *Doe v. City of Belleville, Illinois*, 119 F. 3d 563, 581 (7th Cir. 1997):

> "A woman who is harassed in the workplace . . . because her personality, her figure, her clothing, her hairstyle, or her decision not to wear jewelry or cosmetics is perceived as unacceptably 'masculine' is harassed 'because of' her sex even if the harassment itself is not explicitly sexual. . . . In the same way, a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex."

[8] *Burns v. McGregor Electronic Industries, Inc.*, 955 F. 2d 559 (8th Cir. 1992)(needed work materials deliberately placed where female worker could not reach them): *Andrews v. City of Philadelphia*, 895 F. 2d 1469 (3d Cir. 1990)(plaintiff's case files stolen and destroyed; plaintiff denied routine assistance by fellow workers; anonymous harassing phone calls; plaintiff burned by lime placed on her clothes); *Lippsett v. University of*

hostile work environment. Respondents offer no explanation of why it should be relevant to such cases that the perpetrator and victim were of the same gender, when that circumstance is admittedly irrelevant to other Title VII claims.

Respondents' proposed exemption for same-group harassment would have paradoxical results in actual litigation. Suppose, for example, that a black FBI agent demonstrated that he was the target of systemic but anonymous racist harassment, including racial epithets and cartoons, race specific death threats, etc. On respondents' view, that evidence would be insufficient as a matter of law to establish a Title VII claim, unless the plaintiff could also prove that the anonymous threats and other harassment did not come from a black employee.[9]

Puerto Rico, 864 F. 2d 881 (1st Cir. 1988)(female residents told that they were to "lick the floor" if ordered to do so); *Hall v. Gus Construction Co., Inc.*, 842 F. 2d 1010 (8th Cir. 1988)(co-workers urinated in plaintiff's water bottle; refused to fix carbon monoxide in her truck); *see Doe v. City of Belleville, Illinois*, 119 F. 3d at 576 (citing cases).

A fortiori a violation is established by evidence that the harassment in question both was targeted only at persons of one gender and was facially sex-related.

[9] Racial harassment of black workers is often anonymous. *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1266 (7th Cir. 1991)(graffiti on bathroom walls; "Hi Bob KKK" painted on work shed; hanging black dummy with simulated blood; bullet fired into plaintiff's house); *Davis v. Monsanto Chemical Co.*, 858 F. 2d 345, 347 (6th Cir. 1988)(graffiti on bathroom walls; defaced poster); *Hunter v. Allis-Chalmers, Corp.*, 797 F. 2d 1217 (7th Cir. 1986)(graffiti on bathroom walls; racially derogatory notes; hangman's noose); *Snell v. Suffolk County*, 782 F. 2d 1094, 1098-99 (2d Cir. 1986)(car vandalized; racially derogatory leaflets posted on bulletin boards and walls; black worker mailed Ku Klux Klan applications); *Gilbert v. City of Little Rock*, 772 F. 2d 1390 (8th Cir. 1982)(graffiti on bathroom walls; racial cartoon on bulletin board); *Vaughn v. Pool Offshore Co.*, 683 F. 2d 922 (5th Cir. 1982)("KKK Headquarters" painted on facade

II. TITLE VII APPLIES TO SAME-SEX SEXUAL HARASSMENT

Correctly observing that a plaintiff who demonstrates the existence of *sexual* harassment need not adduce separate evidence--over and above the sexual nature of the harassment--of "deliberate decisionmaking", respondents urge that this fact somehow renders inappropriate the application of Title VII to same-sex sexual harassment. Respondents seemingly contend that sexual harassment is only unlawful because it is a form of oppression of women by heterosexual men. (R. Br. 7, 12, 14, 18). On respondent's view the libidinous desires of a male perpetrator are the very reason for, and thus ordinarily a necessary element of, a Title VII sexual harassment claim; harassment claims by men based on unwelcome sexual advances by women are cognizable only because Congress somewhat inexplicably wrote Title VII in gender-neutral terms. Nothing in the language or established construction of Title VII supports this interpretation.

Respondents' description of the evidence needed to establish a different-sex sexual harassment claim is accurate, but provides no basis for placing same-sex sexual harassment outside the scope of the statute. Sexual harassment, like other gender-specific[10] or race-specific harassment, is facially

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of company tool shed); *DeGrace v. Rumsfield*, 614 F. 2d 796, 800 (1st Cir. 1980)(anonymous threatening notes; sabotage of equipment).

[10] Female workers, for example, may be subject to gender-specific abuse or ridicule, such as being derided as intellectually inferior to men, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 19 (1993)("You're a woman, what do you know"); *Lipsett v. University of Puerto Rico*, 864 F. 2d 881(1st Cir. 1988)(repeated remarks to female surgery residents that women are not competent to be surgeons); *Rabidue v. Osceola Refining Co.*, 805 F. 2d 611 (6th Cir. 1986)(supervisor insisted regarding female plaintiff's position that "we really need a man in that job"), or being

discriminatory; proof that such practices were severe or pervasive enough to create a hostile work environment is sufficient without more to establish a violation of Title VII[11].

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subjected to gender specific insults or epithets. *Harris*, 510 U.S. at 19 ("dumb ass woman"); *Wyerick v. Bayour Steel Corp.*, 887 F. 2d 1271 (5th Cir. 1989)(plaintiff repeatedly referred to on company radio as a "fucking bitch"); *EEOC v. Hacienda Hotel*, 881 F. 2d 1504 (9th Cir. 1989)(plaintiffs referred to as "whore" and "slut"); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F. 2d 900 (11th Cir. 1988)(plaintiff called "bitch" and "whore"); *Hall v. Gus Construction Co., Inc.*, 842 F. 2d 1010 (8th Cir. 1988)(female construction workers regularly referred to as "Fucking Flag girls").

The Seventh Circuit correctly observed in *Doe v. City of Belleville, Illinois*, 119 F. 3d at 578:

> "[I]t is one thing to berate a female worker as 'worthless'; although derogatory, the term on its face is gender neutral, and a hostile environment claim founded upon that type of generic harassment typically would require proof that women were belittled while men were not. But, as the Ninth Circuit has recognized, it is quite another 'to call her "a worthless broad,"' *Steiner v. Showboat Operating Co.* . . . [or] to berate her with terms like 'bitch' or 'cunt'."

[11] This case provides no occasion to decide whether an employer might be able to overcome proof of such a facially gender based practice by proving that (l) the perpetrator harassed both men and women with equal frequency, (2) the men and women were harassed in an equally severe manner, *and* (3) the harm caused by the harassment was the same for male and female victims. In the instant case respondents do not contend Lyons, Pippen and Johnson had ever harassed women in the manner alleged by petitioner, or would have done so if only they had worked at a job site at which women were employed.

This issue is evidently of no practical significance, since there appear to be no reported sexual harassment cases in which the highly unusual circumstances which would raise this issue were in fact present. *See* Brief of National Organization of Male Sexual Victimization, Inc., *et al.*, as Amicus Curiae in Support of Petitioner, pp. 21-22.

Sexual or gender-specific harassment is fundamentally different from harassment that is facially neutral in content and significance; as to such facially neutral harassment a plaintiff must prove that that action arose from a discriminatory intent in order to establish a disparate treatment claim. Where, however, the action complained of is facially discriminatory, no such demonstration is required. Thus proof that an employer had in effect a policy of forbidding workers to associate with persons of other races[12] would be sufficient by itself to establish a violation of Title VII, without regard to why the employer adopted the rule or whether the rule was enforced equally on all employees.

This Court's sexual harassment decisions treat proof that harassment was sexual in nature as sufficient to establish that the harassment was "because of [the plaintiff's] sex"[13]. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), Michelle Vinson alleged that she had been subjected to repeated, at times violent sexual abuse by her supervisor, Sidney Taylor. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), Teresa Harris proved that she had been the target of a stream of sexually offensive and misogynistic remarks by

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[12] *See Watson v. Nationwide Insurance Co.*, 823 F. 2d 360, 361-62 (9th Cir. 1987); *Parr v. Woodmen of the World Life Inc.*, 791 F. 2d 888, 892 (11th Cir. 1986); *Reiter v. Central Consol. Sch. Dist.*, 618 F. Supp. 1458, 1460 (D.Colo. 1985); *Gresham v. Waffle House, Inc.*, 586 F.Supp. 1442, 1445 (N.D.Ga. 1984); *cf. Loving v. Virginia*, 338 U.S. 1 (1967).

[13] A rule that an employer could defend a sexual harassment claim by offering evidence that persons of the opposite gender were also harassed would create bizarre incentives. If that were the case, "a man who makes a habit of harassing female co-workers might insulate his employer from liability . . . by occasionally harassing a male worker sexually, even if he preferred to harass women." *Doe v. City of Belleville, Illinois*, 119 F. 3d at 590.

her boss, Charles Hardy. Neither opinion attached any significance to why Taylor or Hardy had chosen to sexually harass Vinson and Hardy, or to how they might have treated others. To the contrary, *Meritor* held that Vinson's allegations of "not only pervasive harassment but also criminal conduct of the most serious nature" were by themselves "plainly *sufficient* to state a claim for 'hostile environment' sexual harassment." 477 U.S. at 67 (emphasis added); see *id.* at 74 (Marshall, J., concurring)("workplace sexual harassment is illegal, and violates Title VII"); *Harris v. Forklift Systems Inc.*, 510 U.S. at 24 (Scalia, J., concurring)("*Meritor* . . . held that Title VII prohibits sexual harassment that takes the form of a hostile work environment. . . . [S]exual harassment is actionable if it is 'sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."'").

Meritor quoted and expressly approved the definition of unlawful sexual harassment contained in the EEOC Guidelines, 29 C.F.R. §1604.11(a)[14]. 477 U.S. 65-66. Those Guidelines, like *Meritor* itself, contain no requirement that the victim of sexual harassment adduce evidence regarding the sex or sexual orientation of her or his harasser or the manner in which the harasser treated others. If Taylor indeed harassed Ms. Vinson in the manner alleged in *Meritor*,

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[14] "Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."(Footnote omitted).

it would be irrelevant whether he did so because her found her sexually attractive, because he held some personal grudge against her, because he wished to express some generalized hatred of (or affection for) women, or because he was venting some displaced anger that arose out of circumstances entirely unrelated to Vinson, sexuality, or gender.[15]

The very fact that sexual harassment *is* sexual in nature is sufficient to meet the plaintiff's burden. It is a matter of common sense, confirmed by long judicial experience and by the decisions of this Court, that where abuse is sexual in nature, the victim's sex was a substantial factor[16], often the only factor, in the perpetrator's action directing that abuse at the victim, or in the perpetrator's selection of sexual abuse as the method[17] of harassment. Although some early decisions suggested simply that a victim's sex could be presumed to be a factor in a sexual harassment case[18], the lower courts--like this Court in *Meritor* and *Harris*--have long regarded the sexual nature of such harassment as dispositive.[19]

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[15] E.g. *Winsor v. Hinckley Dodge, Inc.*, 79 F. 3d 996, 998 (10th Cir. 1996)(harassment of plaintiff began with dispute over apportionment of sales commissions).

[16] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-50 (1989).

[17] The Seventh Circuit has correctly recognized that discrimination can lie "not [only] in the selection of victims (which might be random) but[also] in the decision to perpetrate the harassment through words and conduct charged with unmistakable racial, religious, and ethnic overtones hostile to each victim because of his particular race, religion or ethnicity." *Doe v. City of Belleville, Illinois*, 119 F. 3d at 580.

[18] *Barnes v. Costle*, 561 F. 2d 983, 989 n. 49, 990 (D.C.Cir. 1977).

[19] *E.g. Nichols v. Frank*, 42 F. 3d 503, 511 (9th Cir. 1994); *Andrews v. City of Philadelphia*, 895 F. 2d 1469, 1482 n. 3(3d Cir. 1990); *Henson v. City of Dundee*, 682 F. 2d 897, 904 (11th Cir. 1982); *Cline v.*

Nothing about same-sex harassment would warrant a method of analysis different than was utilized in *Meritor*, *Harris*, and their progeny. Most of the reported same-sex sexual harassment cases present factual circumstances indistinguishable--except for the fact that the perpetrator and victim were of the same gender--from different-sex harassment cases. Same-sex claims most often involve either unwelcome sexual advances from perpetrators seeking an intimate sexual relationship with the victim, or quid pro quo demands from supervisors for such a relationship[20]. In many of these cases, as here, the harassment is so severe that the victims are forced to resign, a consequence which interferes far more than a demotion or pay reduction with their employment opportunities with the employer involved. Because section 703(a) refers only to the sex of the victim, and not to the sex of the harasser, there is no basis for treating such cases differently from different-sex harassment cases. "[I]f [petitioner] were a woman, there would be no agonizing over whether the harassment . . . described could be understood as sex discrimination. The happenstance that he is instead a male should not make for an entirely different analysis, particularly for purposes of a statute that forbids sex

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General Elec. Credit Auto Lease, Inc., 784 F. Supp. 650, 654 (N.D.Ill. 1990).

[20] The Title VII prohibition against different-sex sexual harassment cases is not, of course, limited to such situations. *Harris v. Forklift Systems* involved neither sexual advances nor quid pro quo demands. Nor is there any requirement in different-sex harassment cases that the perpetrator be a heterosexual. Any requirement in same-sex harassment cases that the plaintiff prove that the harasser was a homosexual, in orientation or past practice, would lead to horrendous problems of discovery and proof, and to extensive proceedings on matters that are quite removed from the purposes of Title VII, to protect the *victim* against discrimination on account of *his or her* gender.

discrimination." *Doe v. City of Belleville, Illinois*, 119 F. 3d 563, 57[illegible] (7th Cir. 1997).

Respondents do not and could not deny that the incidents alleged in the complaint in the instant case were sexual in nature. They do not assert, for example, that Lyons had some non-sexual reason for repeatedly touching petitioner with his penis rather than with some other part of Lyons' body, that Lyons rubbed a bar of soap between petitioner's buttocks to help him wash that part of his body, or that Lyons' repeated statements that he was going to "fuck [petitioner] in [his] behind" was some sort of a metaphor. Under Louisiana law several of these alleged actions would constitute sexual battery. LSA-R.S. §43.1 (1997.)[21]

A holding that the sexual harassment forbidden by Title VII is not limited to heterosexual advances or quid pro quo demands would not convert Title VII into a prohibition against discrimination on the basis of sexual orientation. The discrimination complained of in this case has whatever to do with petitioner's sexual orientation. Petitioner could establish the existence of an unlawful hostile work environment, for example, by showing that the harassment of a sexual nature occurred, or that respondent Sundowner would have accorded

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[21] "A. Sexual battery is the intentional engaging in any of the following acts with another person . . . where the offender acts without the consent of the victim . . . :

(1) The touching of the anus . . . of the victim by the offender using any instrumentality or any part of the body of the offender; or

(2) The touching of the . . . genital of the offender by the victim using any instrumentality or any part of the body of the victim."

The punishment for this offense under Louisiana law is a term of imprisonment of ten years "without benefit or parole, probation, or suspension of sentence."

a greater degree of protection to a woman complaining about such harassment. Neither such showing requires proof regarding the sexual orientation of either petitioner, the alleged harassers, or the supervisors responsible for deciding how to respond to petitioner's complaints.

III. A TITLE VII SEX DISCRIMINATION PLAINTIFF IS NOT REQUIRED TO PROVE THAT PERSONS OF THE OPPOSITE SEX WERE SIMILARLY SITUATED AND TREATED DIFFERENTLY

Respondents argue, in the alternative, that in the instant case it will be impossible to prove unlawful discrimination because only men worked on the platform on which petitioner was employed. This contention does not appear to be related to the fact that the harassment in this case involved persons of the same sex, but is apparently proffered as a general principle applicable to all Title VII cases.

Insofar as petitioner is able to prove at trial that harassment of a sexual nature occurred and was sufficiently severe or pervasive to create a hostile work environment, he, like the plaintiffs in *Meritor* and *Harris*, will have met his burden. Were this Court to hold that sexual harassment as a matter of law can never be proven where all the perpetrator's potential victims were members of the same protected group, such a holding would create the equivalent of free-fire zones, in which harassment on the basis of gender, race or national origin would--for want of a similar comparator--be permissible under Title VII. If, for example, the male owner of the Forklift Systems had had only female employees, on respondents' view he could have sexually harassed all of them with impunity, since that workplace--like the offshore platform in this case--would have had no employees of the opposite gender with which that treatment could be compared. Adoption of respondents' proposed rule would also create a

variety of perverse incentives. In the instant case, for example, respondent Sundowner would in its own view face serious potential financial liability for actions of the sort which occurred in this case if, but only if, it were to hire a woman to work on the platform in question, since an assessment of comparable treatment on the platform itself would then be possible. Indeed, once a discrimination charge such as that in the instant case had been filed with the EEOC, an employer would be under great pressure not to hire any woman to work at the job site in question until the claim had been finally resolved on the merits.

The complaint in this action also alleged that the individual respondents verbally abused petitioner in non-sexual, gender-neutral terms. (App. 76). To establish that such gender-neutral action was discriminatory, petitioner would have to prove that his gender was a factor in the abuse. But the fact that no women worked on the platform in question would not be fatal to such a contention. Respondents argument confuses one method of proving an illicit intent with the actual elements of such a discrimination claim.

Evidence of dissimilar treatment of similarly situated women is but one manner in which a plaintiff might demonstrate the existence of a discriminatory intent. Even in the absence on the platform of women with whom petitioner's treatment might be compared, other types of probative evidence might well be adduced that would persuade a reasonable trier of fact that gender was a factor in the harassers' actions. Statements made by the harassers regarding why they were hostile to petitioner (or perhaps others), such as objections that petitioner failed to conform to some sexual stereotype, would obviously be relevant. Evidence might be adduced regarding whether the perpetrators, at other periods in their working lives when they

worked at facilities with female employees, and had or had not abused them in similar ways. At this juncture in the litigation the alleged harassers have not even proffered any gender-neutral explanation as to why they targeted petitioner for abuse; their sworn testimony may conceivably support petitioner's contentions. Even if they ultimately offer some gender-neutral explanation for their conduct, a rejection of that account by the trier of fact, particularly "accompanied by a suspicion of mendacity", could be sufficient to justify a finding of discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

Respondents argue that a gender-based intent can only be proven, and thus that gender-based discrimination is as a practical matter is only forbidden by Title VII, when there is a comparator of the opposite gender who, despite being in identical or essentially similar circumstances, has been treated more favorably. This Court expressly rejected such an interpretation of Title VII in *County of Washington v. Gunther*, 452 U.S. 161 (1981). The defendant in that case contended that Title VII did not forbid an employer to discriminatorily underpay a female worker "unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay." 452 U.S. at 178. This Court held that Title VII did not permit such discriminatory schemes.

> [I]f an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination. . . . [A] female auditor thus might have a cause of action while a female secretary might not. . . . [This proposed] reading is thus flatly inconsistent with our past interpretations of Title VII

> as "prohibit[ing] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of . . . sex . . . ."

452 U.S. at 179-80.

On respondents' view, an employer with only women workers doing a particular type of work could avowedly pay those employees low wages because of their gender, since there would be no similarly situated male workers with whom they could be compared; that is the very practice expressly declared unlawful by *Gunther*. If the only employee who held a particular job, or who had committed a particular transgression, was a woman, under respondents' approach an employer might be able with impunity to fire her on account of her gender, since there would be no substantially identical male worker with whom her treatment could be compared. The lower courts have properly refused to read such loopholes into Title VII. *Leffel v. Valley Financial Services*, 1997 U.S.App. LEXIS 11359, *18-*19 (6th Cir. 1997); *Brown v. Parker-Hannifin Corp.*, 746 F. 2d 1407, 1410 n. 3 (10th Cir. 1984).

CONCLUSION

For the above reasons the decision of the court of appeals should be reversed.

Respectfully submitted,

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No. 96-568

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH ONCALE, PETITIONER

v.

SUNDOWNER OFFSHORE SERVICES, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, protects employees from sexual harassment regardless of whether the employee and the harasser are of the same sex.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-568

JOSEPH ONCALE, PETITIONER

v.

SUNDOWNER OFFSHORE SERVICES, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits discrimination in employment because of an individual's sex. The Equal Employment Opportunity Commission (EEOC) was established by Congress to interpret and enforce Title VII. The EEOC participated as amicus curiae in this case in the court of appeals.

The Attorney General is responsible for enforcing Title VII in cases in which the employer is a government, a governmental agency, or a political subdivision. 42 U.S.C. 2000e-5(f)(1). The United States, in its capacity as employer and otherwise, has a strong interest in ensuring the fair and balanced enforcement of the federal civil rights laws. In response to the Court's order inviting the Solicitor General to express the views of the United States, the Solicitor General filed a brief on behalf of the United States and the EEOC suggesting that the petition for a writ of certiorari be granted.

STATEMENT

1. Petitioner, Joseph Oncale, was employed by respondent Sundowner Offshore Services, Inc. (Sundowner), on an offshore oil rig from August to November 1991. Pet. App. 2. He filed the instant suit in the United States District Court for the Eastern District of Louisiana against Sundowner, his direct supervisor John Lyons, and two co-workers, Danny Pippen and Brandon Johnson. The complaint alleged that respondents had subjected petitioner to sexual discrimination and harassment in employment practices, and consequently had forced him to resign, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 1. Petitioner alleged that he had been subjected both to a discriminatorily hostile work environment and to *quid pro quo* harassment because of his sex. His complaint recited three specific instances of physical sexual harassment. *Ibid.*

Discovery proceeded and respondents moved for summary judgment, contending that, under Fifth Circuit precedent, petitioner's claim was not actionable

under Title VII because petitioner was of the same sex as the alleged harassers. J.A. 27, 33 (citing *Garcia* v. *Elf Atochem North America*, 28 F.3d 446, 451 (1994); *Giddens* v. *Shell Oil Co.*, No. 92-8533 (Dec. 6, 1993) (unpublished)). Respondents acknowledged that claims of *quid pro quo* sexual harassment have been brought successfully in some district courts under Title VII where the employee was male and the supervisor was a male homosexual, but respondents contended that was not the case here. J.A. 35-36. Respondents also contended that, in any event, petitioner could not make out a prima facie case of hostile work environment harassment because respondent Sundowner employed only males on the platform where petitioner worked. J.A. 34. Respondents submitted evidence that Sundowner did not employ any females on its rigs. J.A. 41.

Petitioner opposed summary judgment, contending that there is no blanket prohibition to recovery under Title VII "by a male employee who is sexually harassed by other male employees who control the terms, conditions and duration of [his] employment while a fully informed [supervisor] take[s] no action." J.A. 46. Petitioner submitted his sworn testimony that, on or about October 25, 1991, his supervisor Lyons physically assaulted him by placing his exposed penis on petitioner's head while Pippin held petitioner down and Lyons told petitioner that he was going to "fuck [petitioner] in [his] behind." J.A. 76; see also J.A. 20. Immediately after the incident, he informed a supervisor about the harassment, but the supervisor took no action. J.A. 77. The following day, Johnson held him down while Lyons placed his exposed penis on petitioner's arm. J.A. 76; see also J.A. 20. Johnson himself testified that he had picked petitioner up, grabbed

him, and was holding him when Lyons told him to hold petitioner there and threatened that he was going to expose his penis and put it on petitioner. J.A. 83, 84. Johnson testified that he let petitioner go, however, so that Lyons did not carry out that threat. J.A. 83, 84. Petitioner testified that while he was taking a shower Pippin and Lyons got in with him and Pippin lifted petitioner up and folded him over while Lyons "rubbed a bar of soap between [his buttocks] and told [him], 'Yeah, we know you talked to daddy about it, but we're going to fuck you anyway.'" J.A. 67; see also J.A. 20. Petitioner testified that he believed his supervisor Lyons intended "[t]o have sex with [him], to rape [him]." J.A. 70. When petitioner returned to work after a few days off, he was again sexually harassed by verbal sexual advances, predominately from Lyons, including threats of anal intercourse. J.A. 72-73. He again told supervisors about the advances, but nothing was done. J.A. 73. Petitioner resigned, stating on the separation form that he quit because of sexual harassment. J.A. 79-80.

2. The district court granted respondents' summary judgment motion and dismissed petitioner's claim. Pet. App. 10-15. Citing *Garcia*, *supra*, as binding circuit precedent, the district court ruled that petitioner, "a male, has no cause of action under Title VII for harassment by male co-workers." *Id.* at 14.[1]

3. The court of appeals affirmed. Pet. App. 1-7. Although it acknowledged that the analysis in *Garcia*

[1] The district court also found that respondents Pippin and Johnson could not be considered petitioner's employer. Pet. App. 14, 15 n.4. Although petitioner describes Pippin as his de facto supervisor (Pet. 4, 5), he has not sought this Court's review of that issue.

had been "rejected by various district courts," *id.* at 4 & n.2, the court concluded that the prior panel decision was binding precedent, and "bar[red] all same-sex sexual harassment claims" under Title VII, *id.* at 5-6.

SUMMARY OF ARGUMENT

Title VII's coverage is sex-neutral. It protects employees from discrimination because of sex regardless of the gender of the employer or employee. Title VII affords such protection to both men and women, *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 682 (1983), and the Court has never suggested that protection depends on whether the harasser and the employee are of opposite sexes.

There is no exemption from Title VII's sex-neutral coverage for cases of sexual harassment. That is, Title VII's protection against discrimination in the form of sexual harassment does not depend on whether the harasser and employee are of opposite sexes, so long as the discrimination by the employer is "because of [the employee's] sex." The court of appeals' contrary ruling, categorically excluding any Title VII sexual harassment claims involving an employee and harasser of the same sex, is contrary to the plain language of the statute, the longstanding and consistent interpretation of the Equal Employment Opportunity Commission (EEOC), and the approach of the other circuits that have considered the issue.

In light of the erroneous legal standard underlying the entry of summary judgment below, the judgment should be reversed and the matter remanded for further proceedings. Neither the fact that peti-

tioner's harassers may not have been motivated by homosexual attraction, nor the fact that petitioner worked at an all-male worksite, automatically forecloses his claim that he was subject to a discriminatorily hostile work environment or to *quid pro quo* harassment because of his sex.

ARGUMENT

TITLE VII'S PROHIBITION AGAINST SEXUAL HARASSMENT THAT CONSTITUTES SEX DISCRIMINATION IN THE WORKPLACE PROTECTS ALL EMPLOYEES, REGARDLESS OF THE SEX OF THE HARASSER OR EMPLOYEE

1. The sole legal question presented in this case can, and should, be decided by reference to the plain text of the governing statute. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 255, states, in relevant part, that "[i]t shall be an unlawful employment practice for an employer"

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2(a)(1). On its face, this provision prohibits all who meet the statutory definition of the term "employer" (42 U.S.C. 2000e(b)) from discriminating against either male or female employees "because of" any of the statutory factors—race, color, religion, sex, or national origin.

The Court has repeatedly recognized that Title VII's coverage is sex-neutral and cannot be interpreted to protect one sex of employees, but not the other, from discrimination because of sex. In *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 682 (1983), the Court quoted the text of Title VII and unequivocally concluded: "Male as well as female employees are protected against discrimination." *Ibid.*[2] The Court explained that, as in a case involving a female employee, an employment practice violates Title VII's "simple test" of discrimination if it treats a male employee "in a manner which but for that person's sex would be different." *Id.* at 683 (quoting *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978)). Cf. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that Title VII prohibits racial discrimination in employment against white persons as well as against nonwhites).

On its face, Title VII's sex-neutral prohibition against sex discrimination is not limited to discrimination by the opposite sex. It would have been a simple matter for Congress to limit the reach of Title VII to discrimination between members of opposite sexes by use of that phrase if that had been its intention. See, *e.g.*, 29 U.S.C. 206(d)(1) (Equal Pay Act generally prohibits employer from paying wages to employees at rate less than rate employer pays

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[2] The Court also noted that, although an amendment to Title VII had clarified its applicability to pregnancy, that amendment "did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee—male or female—which was already present in the Act," *i.e.*, from the time of enactment. *Newport News*, 462 U.S. at 675-676 n.11.

to "employees of the opposite sex" for equal work); 38 U.S.C. 101(3) and (31) (defining surviving spouse and spouse as a member of the opposite sex).

There is no validity to respondents' suggestion (Br. in Opp. 10) that Title VII does not apply to same-sex discrimination because members of the same sex cannot discriminate against each other because of sex. As this Court recognized in the context of racial discrimination, "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Castaneda* v. *Partida*, 430 U.S. 482, 499 (1977). See also *id.* at 503 (Marshall, J., concurring) ("Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.") (citations omitted); *id.* at 515-516 & n.6 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.) (favoring inference that members of a group do not discriminate against themselves, but rejecting suggestion "that persons in positions of power can never be shown to have discriminated against other members of the same ethnic or racial group"). The Court thus long ago declared invalid the behavioral presumption "that human

beings would not discriminate against their own kind." *Id.* at 500.[3]

The Court has never suggested that an employee cannot bring a Title VII sex discrimination action if the discriminator is of the same sex. To the contrary, in *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987), a Title VII claim was brought by a male employee who claimed he had been discriminated against because of sex when a female employee was selected for a promotion instead of him. The supervisor who made that promotion decision was male, *id.* at 624-625, as were the overwhelming majority of the employer's officials, administrators, and professionals, *id.* at 621. Although the Court ultimately ruled against the male employee because it concluded that the challenged employment decision had been made pursuant to a valid affirmative action plan, the Court analyzed the claim without any suggestion that such a same-sex discrimination claim was not cognizable under Title VII. *Id.* at 626-642.

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[3] Moreover, same-sex discrimination may be motivated by a variety of reasons other than animosity, and Title VII prohibits such discrimination regardless of the underlying motive. For example, in *Manhart*, *supra*, the Court invalidated, on Title VII grounds, a pension system that presumably had been motivated by a desire to benefit women as a group, but which treated individual women differently from men. In *International Union, United Auto. Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991), the Court held that a policy that excluded women with child-bearing capacity from lead-exposed jobs violated Title VII, as amended to prohibit pregnancy discrimination, despite the ostensibly benign interests that had motivated it. Cf. *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974) (striking down, on due process grounds, law that required women to take maternity leave).

2. Sexual harassment in the workplace constitutes employment discrimination in violation of Title VII if a supervisor makes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," and submission to such conduct is made "explicitly or implicitly a term or condition of an individual's employment," or is "used as the basis for employment decisions affecting such individual." 29 C.F.R. 1604.11(a)(1) and (2) (*quid pro quo* harassment). Also, sexual harassment in the workplace constitutes employment discrimination under Title VII if "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. 1604.11(a)(3) (hostile work environment harassment)).

There is no exemption from Title VII's sex-neutral coverage for cases in which discrimination takes the form of sexual harassment. In *Vinson*, 477 U.S. at 64, the Court unambiguously declared that, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." In rejecting the argument that Title VII should cover sexual harassment cases only if there is economic or tangible loss, the Court analyzed the coverage of Title VII and sexual harassment claims in wholly sex-neutral terms. The Court emphasized that the fact that Title VII is phrased as a prohibition against discrimination in the "'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of *men and women*' in employment." *Ibid.* (emphasis added) (citations omitted). The Court quoted with approval a lower court's conclusion that subjecting members of either sex to sexual harassment violates Title VII: "Surely, a requirement that a *man or woman* run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." *Id.* at 67 (quoting *Henson* v. *City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)) (emphasis added). The Court also found guidance in the EEOC's sex-neutral guidelines defining sexual harassment as a form of sex discrimination prohibited by Title VII. *Id.* at 65 (quoting guidelines' definitions at 29 C.F.R. 1604.11(a)).

When the Court again addressed the definition of a discriminatorily abusive work environment under Title VII, in *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17 (1993), it again spoke of Title VII's coverage of sexual harassment claims in wholly sex-neutral terms. It repeated *Vinson*'s declaration that Title VII had been enacted to "strike at the entire spectrum of disparate treatment of *men and women* in employment." *Id.* at 21 (emphasis added) (citations omitted). Moreover, the Court recognized the serious consequences sexual harassment may have on an employee's career—without any suggestion that the existence of injury from such harassment in the workplace, or Title VII's availability to eradicate it, depends in any way upon the sex of the employee or harasser. To the contrary, the Court described the universal protection of Title VII for all employees against harassment that alters their working condi-

tions based on any of the statutorily proscribed factors:

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.

Id. at 22.

There are a myriad of examples of employment discrimination involving members of the same sex, in both the harassment context and otherwise, that clearly are prohibited by Title VII. Consider, for example, a male supervisor who conditions a male employee's promotion on his agreement to date the supervisor's daughter. Or, to place this example in the harassment context, assume the employee refuses to date the daughter and the supervisor launches a campaign of harassment against the employee, including unrelenting sexual taunts and innuendos in front of co-workers and a flood of sexually explicit materials at his workplace. In both instances, the supervisor discriminates against the employee with respect to terms and conditions of employment because of that employee's sex. The harm inflicted on the employee is no different, and the discrimination no less evident, than if the supervisor had been a woman with a daughter.

Consider alternatively the example of a female supervisor who believes it will advance her career if she aligns herself with the male-dominated management force rather than her female subordinates; consequently, her evaluation reports on female subordinates deliberately do not reflect the high quality of their work. Or, to place the example in the harassment context, assume she harasses the female subordinates by severe and pervasive sexually explicit intimidation and ridicule, in front of other employees, intending that it will interfere with, and lower the quality of, the female subordinates' work. Again, the discrimination based on sex in those circumstances is no less evident or damaging than if the supervisor had been a man who altered his evaluation reports of female subordinates or sexually harassed them because of his belief that women do not belong in the workplace.

The irrelevance of the sex of a harasser is most obvious when one considers that a hostile work environment claim may arise, for example, either from (a) harassment by an anonymous co-worker which the employer refuses to investigate or remedy (*e.g.*, an unrelenting barrage of sexually denigrating graffiti on an employee's locker, daily posting of sexually explicit cartoons involving the employee), or (b) harassment that is aimed at someone other than the employee who brings the claim (*e.g.*, against other employees or customers).[4] When the *Vinson* Court first

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[4] For examples of hostile work environment cases including anonymous harassment and harassment aimed at others or at the workplace generally, see, *e.g.*, *Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1482, 1483-1486 (3d Cir. 1990) (reversing district court rejection of Title VII claim that work environment was "so heavily charged with sexism that it was

discussed Title VII's coverage of hostile work environment claims based on sexual harassment, it quoted with approval *Rogers* v. *EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), which, the Court explained, had held "that a Hispanic complainant could establish a Title VII violation by

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intimidating, hostile, and offensive," in part because district court failed to give appropriate consideration to conduct other than explicit sexual advances toward the employees, including conduct such as use of terms derogatory and insulting to women generally and anonymous posting of pornographic pictures aimed both at particular plaintiffs and in common areas); *Waltman* v. *International Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) (reversing grant of summary judgment in employer's favor, based on evidence that included pervasive anonymous sexual graffiti, and noting that, "[a]lthough not all the graffiti was directed at [plaintiff], it is all relevant to her claim"; other relevant evidence not aimed directly at plaintiff included posting of pornographic drawings and display of used tampons, *id.* at 471; another female worker allegedly was promoted over plaintiff "because she tolerated and, perhaps even encouraged, her fellow workers' sexual behavior," *id.* at 473); *Robinson* v. *Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1493-1494, 1495 (M.D. Fla. 1991) (judgment for Title VII plaintiff based not only on evidence of conduct aimed directly at plaintiff, but also on evidence of pervasive posting, often surreptitiously and thus anonymously, of graffiti and nude and partially nude photographs of women in "sexually suggestive or submissive poses" throughout workplace such that it constituted "a visual assault on the sensibilities of female workers * * * that did not relent during working hours"); cf. *Walker* v. *Ford Motor Co.*, 684 F.2d 1355, 1358-1359 (11th Cir. 1982) (Title VII claim of hostile work environment because of racial harassment based on evidence not only of racial epithet against employee but also of repeated and continuous use of term "nigger" and other racially abusive language to refer to customers and for other purposes at workplace); see also 2 EEOC Compl. Man. § 615.3(a)(3) (Oct. 1981).

demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele." *Vinson*, 477 U.S. at 66. The Court went on to quote *Rogers* as follows:

> [T]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Ibid. (quoting *Rogers*, 454 F.2d at 238). The Court observed that subsequent cases had applied that principle to harassment based on race, and "[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited." *Ibid.*; see also *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 178-181 (1989) (explaining that, in *Vinson*, the Court implicitly approved applicability of Title VII sexual harassment standards to hostile work environment claim based on racial harassment).

Thus, the relationship between the employee and the person creating the hostile work environment is not the focus of the cause of action. Rather, the focus of the prohibition against hostile work environment sexual harassment is on "the relationship between an employee and his working environment." *Rogers*, 454 F.2d at 238. The sex of the harasser matters not at all "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' * * * that is

'sufficiently severe or pervasive to alter the conditions of the victim's employment,'" because of his or her sex. *Harris*, 510 U.S. at 21 (quoting *Vinson*, 477 U.S. at 65, 67).

3. The Fifth Circuit's holding is contrary to the EEOC's longstanding and consistent interpretation. The EEOC has long recognized that harassment on the basis of sex is a violation of Title VII. In 1980, it determined that there was a need for guidelines because sexual harassment "continue[d] to be especially widespread." 45 Fed. Reg. 25,024 (1980). Shortly after promulgation of those regulations (published at 29 C.F.R. 1604.11), the EEOC was called upon to resolve a claim of same-sex sexual harassment. In January 1981, the EEOC reaffirmed its "long standing position * * * that Title VII does not cover discrimination which occurs because of an individual's sexual preference," but it recognized that claims of same-sex harassment were not precluded where the harassment could be shown to be because of an individual's sex. EEOC Dec. No. 81-16 (Jan. 1981), reprinted in EEOC Dec. (CCH Employment Practices Guide) ¶ 6756, at 4796 (1983 ed.). The EEOC emphasized that, under Title VII, "a discriminatory practice is unlawful when it occurs because an individual is male or female," and it concluded that, if the complaining employee, a male, had submitted sufficient evidence to support his claim that he had been laid off because he had rejected the unwanted sexual advances of his supervisor, a male, Title VII would have been violated and the employer would have been responsible for the actions of the supervisor. *Id.* at 4796-4797. Soon thereafter, in its Compliance Manual's directives regarding sexual harassment, the EEOC further specified:

> The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (*not* on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way.

2 EEOC Compl. Man. § 615.2(b)(3) (Oct. 1981) (citing EEOC Dec. No. 81-16 (Jan. 1981)).

Like the EEOC's sexual harassment guidelines on which *Vinson* relied, the EEOC's 1981 decision and subsequent compliance directive on same-sex sexual harassment, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Vinson*, 477 U.S. at 65 (quoting *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141-142 (1976)). As a longstanding agency interpretation, the EEOC's interpretation is entitled to particular deference. See *Brown* v. *Gardner*, 513 U.S. 115, 122 (1994) (citing *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978)); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 142-143 n.4 (1977). See also *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (deference afforded EEOC guidelines depends on, *inter alia*, the "consistency with earlier and later pronouncements") (quoting *Gilbert*, 429 U.S. at 142).

4. In light of the plain, unambiguous text of Title VII, this Court's consistent interpretation of that text as sex-neutral with regard to the statute's coverage, and the EEOC's longstanding and consistent interpretation of Title VII to the same effect,[5] the Fifth Circuit erred in holding that Title VII "bar[s] all s... e-sex sexual harassment claims." Pet. App. 5. All other courts of appeals that have considered the issue have either explicitly rejected such a blanket prohibition, or have suggested or implied that they would.[6]

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[5] The Court has noted the limited legislative history surrounding enactment of Title VII. See *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 63-64 (1986) (prohibition against sex discrimination added to Title VII "at the last minute on the floor of the House of Representatives" so that "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'").

[6] See *Doe* v. *City of Belleville*, No. 94-3699, 1997 WL 400219, at *5, *8 (7th Cir. July 17, 1997) (expressly rejecting blanket prohibition against same-sex sexual harassment claims under Title VII); *Fredette* v. *BVP Management Assoc.*, 112 F.3d 1503, 1510 (11th Cir. 1997) (same); *Yeary* v. *Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (same); *Wrightson* v. *Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) (same); *Quick* v. *Donaldson Co.*, 90 F.3d 1372, 1378-1379 (8th Cir. 1996) (same); *Steiner* v. *Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) ("although words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that *both* men and women * * * have viable claims against [the male supervisor] for sexual harassment"), cert. denied, 513 U.S. 1082 (1995); *Saulpaugh* v. *Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring) ("harassment is harassment regardless of whether it is caused by a member of the same or opposite sex"), cert. denied, 510 U.S. 1164 (1994); *Morgan* v. *Massachusetts Gen. Hosp.*, 901 F.2d 186, 192 (1st Cir. 1990) (in same-sex case, court states "there is a cause of action for sexual harassment," but concludes that employee had not shown conduct was "sufficiently severe or pervasive"); *Bundy* v. *Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (rejecting argument that harassment of employee by homosexual supervisor of same gender is not sex discrimination and noting that "in each instance the question is * * * would the complaining employee have suffered the harassment had he or she been of a different gender?"); *Barnes* v. *Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (noting the possibility of actionable sexual harassment where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender").

The Fourth Circuit, while acknowledging that Title VII is sex-neutral, and therefore that its protection may not categorically be denied to an employee of the same sex as his or her harasser, has limited same-sex harassment claims to instances in which the harasser is a homosexual, *Wrightson* v. *Pizza Hut of America, Inc.*, 99 F.3d 138, 141-143 (1996), and precluded same-sex harassment claims where the harasser and target of the harassment are heterosexuals, *McWilliams* v. *Fairfax County Board of Supervisors*, 72 F.3d 1191, 1195, cert. denied, 117 S. Ct. 72 (1996).[7] That distinction, however, cannot be squared either with the plain text of Title VII or with the purpose underlying Title VII to provide equal employment opportunity by protecting individuals

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[7] Other circuits have recognized same-sex sexual harassment claims in cases where the harasser is homosexual and have reserved judgment on whether they would recognize such claims where a same-sex harasser was heterosexual. *Fredette*, 112 F.3d at 1507; *Yeary*, 107 F.3d at 447-448. Two circuits have held that same-sex sexual harassment claims are cognizable irrespective of the sexual orientation of the harasser. *City of Belleville*, 1997 WL 400219, at *18-*25; *Quick*, 90 F.3d at 1378-1379.

from workplace discrimination, including harassment, because of sex.

An employee can state a Title VII claim based on harassment by a supervisor (or harassment by a coworker that the employer fails to remedy) without alleging that the harassment was motivated by sexual attraction. That is clear from the Court's recognition of the types of sexual harassment at issue in *Vinson* and *Harris*. The sexual harassment alleged in *Vinson* apparently was motivated by the harasser's desire to engage in sexual intercourse with the female employee. See 477 U.S. at 60. The sexual harassment in *Harris*, however, was motivated by the harasser's apparent desire to humiliate women. See 510 U.S. at 19 (supervisor's comments to employee included: "[y]ou're a woman, what do you know," "[w]e need a man as the rental manager," calling her "a dumb ass woman"; making her and other women the target of unwanted sexual innuendos about their clothing, suggesting that she obtained business deals through sex). Also, for example, in *Quick* v. *Donaldson Co.*, 90 F.3d 1372, 1376 (8th Cir. 1996), the employee alleged that he had been subjected to repeated physical assaults wherein other heterosexual workers had grabbed his testicles and verbally harassed him. He did not allege that his harassers had made any sexual advances toward him based on their attraction to him or that they were attracted to him. He contended that because the physical harassment "was directed only at the area of male sexual organs, he would not have been subjected to it but for being male." *Ibid.* The court held that "[e]vidence that members of one sex were the primary targets of the harassment is sufficient to show that the conduct was gender based," *id.* at 1378, and found that it was

sufficient, for purposes of summary judgment, that the physical assaults had been "aimed at [the plaintiff's] sexual organs, his testicles * * * squeezed so hard on one occasion that he almost passed out from the pain," and he had been "verbally taunted," *id.* at 1379. As discussed above, a supervisor may also have personal or career-related motives for sexually harassing an employee of the same sex because of the employee's sex without being sexually attracted to that employee. See pp. 12-13, *supra*; cf. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 667-669 (1987) (fact that union's failure to file grievances on behalf of black workers was not motivated by animosity toward blacks, but rather by strategic decision about how to deal with employer, did not make union's differential treatment based on race any less discriminatory).

At bottom, the question under Title VII is whether the choice of the target or the manner of the sexual harassment was "because of [the employee's] sex," in that the particular employee would not have been subjected to the same harassment had he or she been of the opposite sex. Regardless of whether the underlying motive for the sexual harassment was attraction, hostility, disrespect, or benevolence, such harassment violates Title VII's "simple test" of discrimination because it would be treating that employee "in a manner which but for the person's sex would be different." *Newport News*, 462 U.S. at 683 (quoting *Manhart*, 435 U.S. at 711).[8]

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[8] In light of Congress's refusal to extend Title VII to claims based upon sexual orientation, see 142 Cong. Rec. S10,129-S10,139 (daily ed. Sept. 10, 1996) (S. 2056, a bill to prohibit employment discrimination on the basis of sexual orientation, not passed by Senate), it would be ironic if the availability of a Title VII remedy turned on the sexual orientation of the

5. The Seventh Circuit recently observed that "[a] concern that seems to have motivated a number of courts in refusing to recognize cases of same-sex sexual harassment is that courts will be deluged with complaints stemming from horseplay and rough language among men." *Doe* v. *City of Belleville*, No. 94-3699, 1997 WL 400219, at *26 (July 17, 1997). That court correctly noted, however, that "very similar concerns were expressed when courts rejected the first claims of sexual harassment brought by women." *Ibid.* We agree with the Seventh Circuit that, as with claims of opposite-sex sexual harassment, claims of same-sex sexual harassment based on the occasional off-color comment or trivial conduct will be easily distinguishable from actionable claims. As in opposite-sex cases,

> "mere utterance of an . . . epithet which engenders offensive feelings in a employee," * * * does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

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harasser. Such a condition would, moreover, add significant complexity to Title VII proceedings by requiring, *inter alia*, a trial as to an alleged harasser's sexual orientation.

Harris, 510 U.S. at 21-22 (quoting in part *Vinson*, 477 U.S. at 67). The trier of fact "must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances,' such as the nature of the sexual advances and the context in which the alleged incidents occurred." *Vinson*, 477 U.S. at 69 (quoting 29 C.F.R. 1604.11(b) (1985)).

6. Because the courts below relied on an erroneous legal standard in granting respondents summary judgment, the Court should reverse the judgment and remand the case for further proceedings. That disposition would afford the courts below the opportunity to address, in the first instance, the various evidentiary and other issues that may arise in connection with petitioner's same-sex harassment claim.

Respondents have suggested (Br. in Opp. 13-17), however, that, even under the correct standard of law, petitioner's claim must fail because the oil rig on which he worked employed only males. This, however, mistakes a challenge of proof for a statement of legal principle. Title VII protection is not denied to employees in single-sex workplaces. Regardless of the demographic makeup of a workforce, an employer violates Title VII if it discriminates against an employee because of the employee's sex.

Comparative evidence is not the sole means of establishing that an employee was treated "in a manner which but for [his] sex would be different." *Newport News*, 462 U.S. at 683 (quoting *Manhart*, 435 U.S. at 711). Indeed, in *Vinson* and *Harris*, the Court did not cite any evidence that the female employees had alleged or demonstrated that the harassing supervisor did not make similar advances to, or otherwise harass, male employees.

Discrimination can be proven through direct evidence of the employer's discriminatory bias. See *County of Washington* v. *Gunther*, 452 U.S. 161, 179 (1981) (Congress could not have intended to insulate from Title VII redress a situation in which "an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male").[9] Or there may be other types of comparative evidence: suppose, for example, respondent Sundowner employed females at other locations, and it acted aggressively to stop harassment when female employees at those sites complained about sexual harassment, but it ignored petitioner's comparable complaints.

The current evidentiary record does not automatically preclude petitioner from prevailing on a claim of same-sex harassment in violation of Title VII. The Court should resolve the legal question presented, reverse the judgment below, and remand the case for the lower courts to address the matters of proof.

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[9] See generally *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121-125 (1985) (direct evidence used to establish that practice is discriminatory on its face under Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989) (prima facie case of sex discrimination is shown by evidence that officials involved in decision submitted comments that "stemmed from sex stereotypes"); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.) (invalidating requirement that flight attendants be unmarried; "[n]or is the fact of discrimination negated by [airline's] claim that the female employees occupy a unique position so that there is no distinction between members of the opposite sexes within the job category"), cert. denied, 404 U.S. 991 (1971).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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No. 96-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH ONCALE,

Petitioner,

vs.

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, and BRANDON JOHNSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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31pp

QUESTION PRESENTED

Whether harassment of an individual by a person of the same gender cannot state a sexual harassment claim under Title VII as a matter of law, regardless of whether the harassment has sexual overtones or is motivated by the sex of the victim.

LIST OF PARTIES

1. Joseph Oncale, Petitioner.
2. Sundowner Offshore Services, Inc., Respondent.
3. John Lyons, Respondent.
4. Danny Pippen, Respondent.
5. Brandon Johnson, Respondent.

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No. 96-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH ONCALE,

Petitioner,

vs.

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, and BRANDON JOHNSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, rendered May 20, 1996, is reported at 83 F.3d 118. The opinion of the United States District Court for the Eastern District of Louisiana, rendered March 24, 1995, which the court of appeals affirmed, is not reported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion and entered judgment on May 20, 1996. The petitioner filed a timely Petition for Writ of Certiorari within 90 days of the judgment, pursuant to 28 U.S.C.

§§ 1214 and 2101(c) and Supreme Court Rule 10(c). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(b).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This action involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a)(1), but without reference to the amendments enacted by the Civil Rights Act of 1991.

INTEREST OF *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 2,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court, singly or jointly with other *amici*. Some recent cases are *Oubre v. Entergy Operations, Inc.*, 117 S. Ct. 1466 (1997); *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); and *Hazen Paper Co. v. Biggins*, 508 U.S. 948 (1993).

NELA members represent thousands of individuals in this country who are victims of unlawful employment discrimination. Employment discrimination cases involving disparate treatment are notoriously difficult to prove. First, under the various statutes that prohibit such discrimination, our clients must prove by a preponderance of the evidence that the decisionmaker's motivation was unlawful. Unfortunately, few defendants confess to having an illegal motive, and NELA members face substantial hurdles in meeting their burden of proof. Second, additional barriers to proving our clients' cases have recently been adopted by lower courts, ranging from the

"same actor" and "stray remark" defenses to the misapplication of agency principles.

– The decision of the court of appeals in the present case raises yet another barrier to individuals who seek to be free from discriminatory conduct and sexual abuse in the workplace. By predicating an employer's liability upon the gender of the perpetrator, a factor over which the victim has absolutely no control, the court of appeals would deny any remedy to the victims of such abuse. Adoption of such a bright-line but arbitrary test also would open the door to significant unintended consequences, such as the dismissal of a disability discrimination case if the decisionmaker had a disability. Congress intended no such preclusion of any remedy based merely upon the class membership of the decisionmaker or perpetrator. Rather, it directed courts to look at the status of the victim.

Title VII was intended to strike at the entire spectrum of discrimination in the workplace, regardless of whether the alleged lawbreaker is of the same gender, same race, or same religion as the victim of the discrimination. To protect the interests of its members' clients, therefore, the interest of NELA in this case is that of ensuring that Title VII's goal of eradicating employment discrimination is fully realized.

NELA submits this brief because of the importance of the issues at bar to furthering its goals. The position that NELA takes in this brief has not been approved or financed by petitioner or his counsel. The written consents of all parties have been or are being filed with the Clerk of this Court.

STATEMENT OF CASE

Joseph Oncale worked for respondent, Sundowner Offshore Services, Inc., for approximately four months in 1991. He filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), alleging that he had been sexually harassed by respondents John Lyons (his supervisor) and Danny Pippen and Brandon Johnson (two coworkers). The district court granted summary judgment to respondents on

March 24, 1995, on the ground that, as a matter of law, sexual harassment by persons of the same gender did not violate Title VII. The United States Court of Appeals for the Fifth Circuit affirmed the decision on May 20, 1996.

INTRODUCTION

In employment discrimination cases, the motivation of the decisionmaker or actor is a classic fact issue. Its importance is derived from the "because of" language of Title VII. Since the "because of" language appears in the statute, it is intrinsic to all Title VII disparate treatment cases, including sexual harassment cases.

Yet sexual harassment is qualitatively different from most other kinds of employment discrimination, and the template of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), does not fit. Most employment discrimination cases involve negative employment decisions motivated by hostility to a class of which plaintiff is a member. Sexual harassment may spring from feelings of anger and hostility to men or to women, or it may arise instead from sexual attraction. The similarity lies in the harm suffered by the victim.

"Sexual harassment" covers a wide range of actions, including but not limited to these:

- harassment of a victim because the perpetrator dislikes persons of that gender or does not want persons of that gender in a given job (*see, e.g., Intlekofer v. Turnage*, 973 F.2d 773 (8th Cir. 1992); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988));

- unwelcome attentions, "romancing," or stalking because the perpetrator is sexually attracted to the victim (*see, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986));

- abuse of power by forcing clearly offensive, sexually oriented words or actions on an unwilling but vulnerable victim (*see, e.g., Harris v.*

Forklift Sys., Inc., 510 U.S. 17 (1993); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994); *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991));

- harassment by sexually oriented means of an individual whom the perpetrator dislikes for non-gender-related reasons (*see, e.g., Doe v. City of Belleville*, 1997 WL 400219 (7th Cir. 1997)).

Courts on both the trial and the appellate levels are in disarray about which, if any, of these scenarios violates Title VII when both perpetrator and victim are of the same gender.

As a result of the courts of appeals' difficulty in determining whether to look beyond the plain language of Title VII, the law differs dramatically from circuit to circuit. Accordingly, the fundamental right of an individual to be free from workplace harassment "because of such individual's sex" depends in some jurisdictions upon the sex of the harasser, in other jurisdictions upon the sexual orientation of the harasser, and in other jurisdictions upon neither.

The court-created defenses (a) that "'because of sex' requires the harasser to be sexually attracted to the victim" (Fourth Circuit) and that (b) "anything men do to other men, or women do to other women, cannot possibly be 'because of sex'" (Fifth Circuit) are red herrings. They muddy the statute, divide courts, create unequal justice, and deprive victims of basic statutory rights. These defenses also distort the otherwise well-defined summary judgment standard, since the "because of" language of Title VII is quintessentially a fact issue unless a plaintiff has no evidence to support his claim or it is barred as a matter of law.

Like the statute, this Court has consistently used gender-neutral language when speaking about both perpetrator and victim. Moreover, in non-harassment Title VII cases, this Court has encountered no difficulty with the concept that a person's discrimination against another person of the same sex may violate Title VII. *See Johnson v. Transp. Agency*, 480

U.S. 616 (1987) (male plaintiff brought Title VII sex discrimination action based on allegedly discriminatory decision in favor of a woman, made by another man); *see also Wilson v. Bailey*, 934 F.2d 301 (11th Cir. 1991) (sex discrimination claim brought by male plaintiff; no significance ascribed to fact that decisionmaker was also male); *McQuillen v. Wisconsin Educ. Ass'n Council*, 830 F.2d 659 (7th Cir. 1987), *cert. denied*, 485 U.S. 914 (1988) (same).

The *amicus* respectfully submits that the anomaly created by the circuit court's reading of Title VII cannot be permitted to continue. The decision below should be reversed.

ARGUMENT

The court of appeals in this case held that, regardless of any other facts, Title VII as a matter of law does not encompass any instance of same-sex sexual harassment. It allowed no exceptions, regardless of the egregiousness of the behavior or even a confession by the perpetrator. This decision erroneously deprives a large group of people (indeed, potentially everyone) of the right to be free from sexual harassment in the workplace, based upon a factor over which they have no control: the gender of their harassers. No victim of discrimination -- whether it be based upon religion, race, or sex -- chooses the oppressor. Indeed, no victim of discrimination would voluntarily assume that role at all. Nonetheless, the court of appeals would deny these unwilling victims their statutory rights merely because, in addition to being selected for victimization, they were selected by the wrong harassers.

I. WHETHER JOSEPH ONCALE WAS HARASSED BECAUSE OF HIS SEX IS PROPERLY A QUESTION FOR A FACTFINDER, AND SUMMARY JUDGMENT WAS INAPPROPRIATE.

A. The Standard.

The Fifth Circuit Court of Appeals erred in granting summary judgment in the face of a genuine issue of material fact: whether Joseph Oncale's harassers were motivated by his sex or gender, as opposed to a gender-neutral (even though

offensive) reason. This question, which should properly have been submitted to a factfinder for resolution, instead was decided by the district judge on a motion for summary judgment.

Properly used, a motion for summary judgment legitimately tests a party's ability to put forth sufficient evidence at trial. Improperly used, it allows courts to truncate the proof process in the presence of disputed material facts. Here, the court below decided, in effect, that whether the harassers acted "because of" Joseph Oncale's sex was not a material disputed issue, based upon an irrebuttable presumption having neither statutory nor logical foundation.

Summary judgment is a drastic remedy and must be exercised with care to avoid taking genuine issues of fact away from juries. *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990); *see Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The standard for summary judgment is well established in this Court. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita*, *supra*; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). It may not be granted when the nonmoving party shows the existence of material disputed facts. Fed. R. Civ. P. 56(e). Factfinding is not appropriate on summary judgment when material facts are disputed; the district judge's function is not to weigh the evidence and determine the truth of a matter but to determine whether there is a genuine issue for trial on a disputed material fact. *Anderson*, 477 U.S. at 248-49. Moreover, the quantum of proof required to preclude summary judgment is only "enough evidence so that a reasonable jury could return a verdict" for the nonmoving party; it need not rise to actual proof of the case. *Id.* at 248.

These standards have been jettisoned altogether in decisions of the Fifth Circuit Court of Appeals, including the case at bar, concerning same-gender sexual harassment. Instead of considering whether (as the statute says) an individual can show that he or she was "discriminate[d] against . . . *because*

of such individual's ... sex," 42 U.S.C. § 2000e-2(a)(1) (emphasis added), this circuit court of appeals presently requires summary judgment for the employer in every same-gender sexual harassment case without ever reaching that question. We respectfully submit that this is error.

B. Material Factual Issues in Sexual Harassment Cases.

The elements of a hostile environment sexual harassment case have been described by this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). In brief, a plaintiff who alleges hostile environment sexual harassment can prevail by offering proof of unwelcome sexual conduct or "discriminatory intimidation, ridicule, and insult" that is so severe or pervasive that it alters the victim's conditions of employment by creating an abusive or hostile workplace. *Harris*, 510 U.S. at 21, *quoting Meritor*, 477 U.S. at 65, 67. Indeed, both *Meritor* and *Harris* make only passing mention of the question whether harassment of an explicitly sexual nature could be anything but "because of [the victim's] sex."

In practice, whether sexually oriented words or conduct must also be shown independently to have been motivated by the plaintiff's sex is seldom an issue when harasser and victim are of different genders.[1] Most courts recognize the inference, or presumption, as being obvious. *See, e.g., Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 604 (7th Cir. 1985). Courts tend to focus insead on whether the harassment occurred at all, whether it was uninvited, whether it was sufficiently severe or pervasive to change the plaintiff's terms or conditions of employment, whether it was both subjectively and objectively offensive, and whether the employer had either actual or constructive notice. They generally assume that, when a man sexually harasses a woman in the workplace, he does so because of her sex. *See, e.g.,*

[1] A principal exception is, again, the Fifth Circuit. *See, e.g., Nash v. Electrospace Sys., Inc.*, 9 F.3d 401 (5th Cir. 1993).

Nichols v. Frank, 42 F.3d 503, 411 (9th Cir. 1994); *Horn, supra*, 755 F.2d at 604.

As the Seventh Circuit Court of Appeals recently noted, however, "courts by and large have been unwilling to make the same assumption when a man harasses another man in the workplace, however rife the harassment may be with sexual innuendo, sexual contact, and other conduct of an explicitly sexual nature." *Doe v. City of Belleville*, 1997 WL 400219, at 9 (7th Cir. 1997), *citing McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996), and *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996). We respectfully submit that there is no reason to distinguish among cases of sexual harassment based upon either the gender or the sexual orientation of the alleged perpetrator.

C. The Allegations State Every Element of a Viable Title VII Claim.

The factual allegations in the case now before the Court support every element of a classic hostile environment sexual harassment claim -- and support it abundantly. The court of appeals did not grant summary judgment based upon any failure of proof.

Joseph Oncale alleged, and on a motion for summary judgment his allegations must be taken as true, that (a) the conduct of which he complained occurred, (b) it was unwelcome, (c) he conveyed to the harassers that their actions were offensive to him, (d) the actions were severe and pervasive enough to alter his terms and conditions of employment, (e) Sundowner was apprised of the conduct and its unwelcome nature, (f) Sundowner failed to take prompt, effective remedial action, and (g) he was injured thereby.

Each of these elements is both highly material and highly factual. Accordingly, if any one or more was disputed, summary judgment should not have been granted. *See Meritor*, 477 U.S. at 68. It is not an element of a plaintiff's Title VII claim, however, that the gender of the harasser(s) must be

different from the plaintiff's own. In fact, in cases when the harasser and victim are of different genders, most courts have not considered the sex of the harasser worth mentioning, even in passing, when they set forth the elements of the cause of action.[2]

II. THE DECISION BELOW ERRONEOUSLY CARVED OUT AN EXCEPTION TO TITLE VII AND FAILED TO ACKNOWLEDGE WELL-ESTABLISHED PRINCIPLES OF LAW.

The Fifth Circuit Court of Appeals held that, as a matter of law, a man has no remedy under Title VII for sexual harassment by another man. This holding direct conflicts with two closely related principles developed over the years in this Court.

First, this Court recognizes that members of an advantaged group have the same legal rights under Title VII as do those in disadvantaged groups. Thus, men can be victims of sex discrimination, caucasians can be victims of race discrimination, and Christians can suffer religious discrimination.

Second, as this Court also recognizes, there is no uniformity of thought among people of any given group concerning the presumed characteristics of others in that class. Accordingly, a man who is discriminated against by another man because of his sex has the same legal rights under Title VII that he would have had had the decisionmaker been a woman. Since sexual harassment is merely a subset of sex discrimination, it follows *a priori* that a man who is sexually harassed can assert his legal rights under Title VII, regardless of whether the perpetrator is also a man.

[2] *But see Nash v. Electrospace Sys., Inc., supra* note 1.

A. Individuals in Majority Groups Can Be Victimized by Discrimination.

As this Court has stated, males as well as females are protected by Title VII against discrimination because of sex. *Newport News Shipbuilding & Dry Dock v. EEOC,* 462 U.S. 669, 682 (1983). An employer's practice, therefore, of providing less health insurance coverage to the spouses of male employees than it provides to the spouses of female employees

> [does] not pass the simple test of Title VII discrimination that we enunciated in *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 711 (1978), for it would treat a male employee with dependents "in a manner which but for that person's sex would be different."

462 U.S. at 683. The gender of the decisionmaker was not considered relevant. *See also Johnson v. Transp. Agency,* 480 U.S. 616 (1987).[3]

Similarly, based upon the language of Title VII that prohibits discrimination against "any individual" because of that individual's race, this Court has held that caucasians, like African-Americans, have a right pursuant to Title VII to be free from racial discrimination. Citing legislative history, this Court noted in *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 279 (1976), that "[Title VII's] terms are not limited to discrimination against members of any particular race." *See also Notari v. Denver Water Dep't,* 971 F.2d 585, 588 (10th Cir. 1992) ("Title VII's protection is not limited to those individuals who are members of historically or socially disfavored groups"); *Wilson v. Bailey,* 934 F.2d 301, 304 (11th Cir.

[3] *Cf. Orr v. Orr*, 440 U.S. 268 (1979) (state law that imposed alimony obligation on husbands but not on wives violated equal protection clause of fourteenth amendment); *Craig v. Boren*, 429 U.S. 190 (1976) (law prohibiting sale of 3.2% beer to males under the age of 21 but to females under the age of 18 violated equal protection clause).

1991) (in "reverse discrimination" case, white male plaintiff must prove that job he sought was filled by "minority group member or woman"); *Livingston v. Roadway Express Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986) ("Title VII, of course, prohibits discrimination against groups that historically have not been socially disfavored"); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) ("Title VII, of course, prohibits racial discrimination against all groups"); *Lanphear v. Prokop*, 703 F.2d 1311, 1314-15 (D.C. Cir. 1983) ("Title VII prohibits discrimination against white males upon the same standards that it prohibits discrimination against members of a racial minority").

This principle shows the fallacy in *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988), which the Fifth Circuit Court of Appeals followed in *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-52 (5th Cir. 1994). Not only did Congress not restrict the protection of Title VII to persons at a classwide disadvantage in their workplaces, but Title VII has universally been interpreted in accordance with its plain language to protect all persons from discrimination based upon the characteristics set forth in that statute. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976).

B. Members of One Group Can Discriminate Against Others in the Same Group.

1. The court failed to recognize "the many facets of human motivation."

The court of appeals' rejection of same-sex sexual harassment as a cause of action assumes that, as a matter of law, a member of one group cannot discriminate "because of sex" against another person in the same group. This assumption ignores the individuality of human beings and the vast number of different experiences that form people's beliefs and perspectives. Similarly faulty reasoning was rejected by this Court twenty years ago in a case arising from racial discrimination in the selection of grand juries. As noted in *Castaneda v. Partida*, 430 U.S. 482 (1977):

> Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of the group.

430 U.S. at 499.

Even the Fifth Circuit Court of Appeals has recognized the fallacy of an argument that members of one race cannot possibly discriminate against members of the same race. In *Hill v. Mississippi State Employment Serv.*, 918 F.2d 1233 (5th Cir. 1990), *cert. denied*, 502 U.S. 864 (1991), that court noted:

> [W]e cannot permit future Title VII analysis to be tainted by the district court's casual acceptance of the following fallacy: both black and white [ ] clerks serviced [plaintiff]; therefore, she was not the victim of discrimination, (that is, "Blacks never discriminate against other blacks.") To the argument's self-evident overbreadth, we add that the Supreme Court has rejected it.

918 F.2d at 1240-41 (*citing Castaneda*).[4] *See also Johnson v. Transp. Agency, supra* (male employee was discriminated against because of his sex when female was promoted, even though male made decision); *Wilson v. Bailey*, *supra*, 934 F.2d at 304 (white males protected by Title VII from discrimination in favor of minority group members or females) (dictum); *Jordan v. Wilson*, 649 F. Supp. 1038, 1059 n.15 (M.D. Ala. 1996) ("This court would have to be truly naive to assume that women cannot sexually discriminate against women and that many women do not harbor stereotypical, limited views of themselves"); *Veatch v. Northwestern Mem'l Hosp.*, 730 F. Supp. 809, 817 (N.D. Ill. 1990) (fact that

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[4] Cf. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination"); *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) (replacement of minority employee by individual of same race does not preclude finding of discriminatory intent).

woman fired another woman or black fired another black does not prove that decision was free of racial and gender stereotyping that federal law attempts to remove from employers' decisionmaking).

2. An affirmance could have unintended consequences.

Affirmance of the circuit court's blanket rejection of same-sex sexual harassment could also lead to many unintended (and serious) consequences. If a person with Acquired Immune Deficiency Syndrome had been fired by a decisionmaker who is blind, would not the employer, citing the Court's affirmance in this case, argue that the fired employee has no remedy under the Americans with Disabilities Act because the decisionmaker, like the fired employee, has a disability?[5] And if a 60-year-old chief executive officer adopts the belief that the company needs a younger workforce and terminates many subordinates in their 50s and 60s, would those employees automatically lose their rights under the Age Discrimination in Employment Act merely because the decisionmaker was also a member of the protected age group? While logic and the plain language of those statutes would militate against such defenses, the arguments could clearly be made, and their adoption would cause serious and unintended harm to other victims of discrimination.

III. THE FEARED "HORSEPLAY" EFFECT.

Perhaps one of the most troubling contentions raised in support of reading Title VII to exclude same-sex sexual harassment is that mere mistreatment of employees or "horseplay" might find cognizance in a federal court. That

[5] *Cf. O'Connor v. Consol. Coin Caterers Corp.*, 116 S. Ct. 1307 (1996) (replacement of terminated over-40 plaintiff by another person in protected class does not preclude *prima facie* case under Age Discrimination in Employment Act); *DeLesstine v. Fort Wayne State Hosp.*, 682 F.2d 130 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982) (rejecting argument that *prima facie* case was destroyed by replacement of black male by female, member of another protected class).

hollow argument need not trouble this Court. Both litigants and courts are accustomed to sifting through facts and entertaining only viable cases under Title VII. This Court should not fall victim to the implicit contention that neither lawyers nor courts can be trusted to recognize a colorable Title VII claim.

Underlying the argument that male-on-male or female-on-female abuse and hostility can never be illegal is an implied assumption that workplace harassment among persons of the same gender is inherently different from other types of abuse because "boys will be boys." *See McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996). But the fact that sexual harassment may be accompanied by personal enmity or hooliganism does not detract from its character as sexual harassment. *See Quick v. Donaldson Co.*, 90 F.3d 1373 (8th Cir. 1996); *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 964-65 (8th Cir. 1993) (*Burns II*). "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive," Title VII is violated, and personal enmity or hooliganism are not excuses for conduct that otherwise violates Title VII. *Harris*, 510 U.S. at 22.

The ultimate question in all harassment cases is whether the actions were sufficiently "severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris*, 510 U.S. at 21 (*quoting Meritor*, 477 U.S. at 67). Not every offensive action will rise -- or sink -- to this level. In some cases, the offensive work-related nature of the actions will be clear; in others, it will be less clear, and in some, the acts either will not be sufficiently severe or pervasive or will not alter the victim's working conditions.

Each of these situations will require the parties and the courts to review the facts to see whether the protections of Title VII are truly involved. Such a review must focus upon the background and purposes of Title VII, *i.e.*, to prevent discrimination from infecting a person's work environment. The

defining assessment must be based upon whether there is sufficient evidence of the elements of a Title VII harassment case to permit a jury to find that discrimination based on sex created a work environment that a reasonable person would find abusive or hostile, and that the victim specifically perceived it to be so. *Harris,* 510 U.S. at 21-22.

Title VII also requires a court to examine whether the alleged harassment adversely affected the victim's terms, conditions, or privileges of employment -- not whether it had purely personal or social consequences. 42 U.S.C. § 2000e-2(a)(1); *Alvey v. Rayovac Corp.*, 922 F. Supp. 1315, 1330 (W.D. Wis. 1996). This focus upon the work environment creates a second check upon a cavalier application of Title VII to all boorish behavior, wherever it occurs. Title VII is implicated only when a person's working environment is adversely affected by alleged discriminatory acts.

It is clear that sexual harassment cases are fact-bound. Whether harassment is sufficiently severe or pervasive to create liability under Title VII involves analysis of a variety of factors and consideration of all the circumstances, an effort that clearly calls for factfinding. *Harris*, 510 U.S. at 23; *Burns v. McGregor Elec. Indus.*, 955 F.2d 559, 564 (8th Cir. 1992) (*Burns I*); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988). Sexual harassment can occur in many different forms, and there should be no excuse for unrestrained abuse of an employee because of his or her gender. *Burns II*, 989 F.2d at 965. An employee has a right to work in an environment free of sexually oriented discrimination and intimidation, ridicule and insult. *Meritor*, 477 U.S. at 65.

Whether the challenged conduct may be prohibited discrimination or *de minimis* "horseplay" is in the first instance the district court's concern when considering a motion for summary judgment. In order for it to be the former, the plaintiff must show facts that can establish an objectively as well as subjectively abusive or hostile work environment. *See, e.g., Callanan v. Runyon,* 75 F.3d 1293 (8th Cir. 1996); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th

Cir.), *cert. denied,* 116 S. Ct. 473 (1995). The task that faces a court when an employer alleges that the harassment was not sufficiently severe or pervasive to support a Title VII claim was recently explained by the Seventh Circuit Court of Appeals:

> [Title VII] is not designed to purge the workplace of vulgarity. Drawing the line is not always easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.

Baskerville v. Culligan Int'l. Co., 50 F.3d 428, 430 (7th Cir. 1995) (citations omitted).

If facts are shown sufficient to support an inference that the conduct was severe or pervasive enough to violate Title VII, the next question for the jury's consideration is whether the abuse and hostility occurred for an illegal sex-based reason and not for some offensive but legal reason. The jury's function is to determine whether the conduct was "because of" the victim's sex.

IV. PROVING MOTIVATION IN SAME-SEX SEXUAL HARASSMENT CASES.

A. Sexual Attraction.

Proof of same-sex sexual harassment can be made in any of three ways. The most obvious way to prove that harassment occurred "because of sex" is to show that the harasser acted out of sexual attraction to the plaintiff (*i.e.*, by proving the harasser's homosexuality or bisexuality). *See Fredette v. BVP Management Assocs.,* 112 F.3d 1503, 1507 (11th Cir. 1997) ("We readily understand a homosexual male's advances towards another male to occur 'because of sex'; we understand this both out of common experience and in recognition of the parallels between this situation and the paradigm case of

harassment involving a heterosexual male and a female victim"); *Yeary v. Goodwill Indus.*, 107 F.3d 443, 447-48 (6th Cir. 1997) ("[T]his case is about as traditional as they come, albeit with a twist. It is about an employee making sexual propositions to and physically assaulting a coworker because, it appears, he finds that coworker sexually attractive"); *Wrightson v. Pizza Hut*, 99 F.3d 138 (4th Cir. 1996) ("[A] claim under Title VII for same-sex 'hostile work environment' harassment may lie where the perpetrator of the sexual harassment is homosexual"). As the Fourth Circuit Court of Appeals remarked in *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 752 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996), courts will operate from a presumption that people are heterosexual, and (under the "attraction" form of proof) this presumption must be overcome by the plaintiff's evidence to the contrary before he or she may proceed with a same-gender harassment case.

One obvious problem with this method of proof is that the requisite evidence may not be easy to obtain. It could, for example, necessitate mental examinations of the alleged perpetrator under Fed. R. Civ. P. 35 to discover any latent homosexual or bisexual tendencies.

This method of proof also incorrectly presumes that sexual attraction, rather than an abuse of power, is always what motivates a sexual harasser. Yet proof of sexual attraction has been specifically rejected as a requirement when a female is sexually harassed by a presumably heterosexual male supervisor. *See, e.g., McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985).

B. Disparate Treatment.

A second way to prove liability under Title VII for same-sex harassment is to prove that the perpetrator harassed only employees of his or her own gender. This method of proof was used in *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372 (8th Cir. 1996). The *Quick* court observed that, should the evidence show incidents of the challenged conduct by the male perpetrators against only male and not female employees, a

reasonable jury could find that the treatment of men was worse than that of women. This method of proof is useful in workplaces where both men and women are employed but the perpetrator subjects only an employee of the same gender to sexual harassment.

This method of proof should not, however, require proof of gender-based animus. As the Seventh Circuit Court of Appeals recently pointed out in *City of Belleville, supra*, 1997 WL 400219 at 16 n.19, proving that the perpetrator has an animus against his or her own gender is not likely to be an easy task. Again, if such proof were required, mental examinations pursuant to Rule 35 might be required.

Requiring proof of such animus also would ignore the many decisions holding that an individual victim of discrimination need not prove that the decisionmaker was hostile to the entire class of which the plaintiff is a member. Title VII protects individual people and does not require proof of group animus. *Connecticut v. Teal*, 457 U.S. 440, 458 (1982).

C. The Sexual Nature of the Harassment.

The third way to prove that same-sex sexual harassment occurs "because of" the victim's sex is to show that the conduct itself was sexual in nature. Regardless of whether the individual perpetrator regards himself or herself as homosexual or is shown to be latently so, acts involving sexuality are sexual *per se*.[6] This was specifically addressed in *City of Belleville, supra*, in which the court noted:

> Frankly, we find it hard to think of a situation in which someone intentionally grabs another's

---

[6] The nonconsensual sexual acts alleged in this case could, for example, result from a psychological disorder known as sexual sadism, in which an individual is sexually aroused by the suffering of a victim (whether consenting or nonconsenting), such suffering sometimes brought about by restraining, beating, or raping the victim. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH ED. ("DSM-IV") at 530 (1994 American Psychiatric Association).

> testicles for reasons entirely unrelated to that person's gender. But the overall context of the harassment alleged in this case -- the name-calling, the references to sexual assault, and the intrusive, intimate touching, all of which expressly invoked H.'s gender -- certainly makes it reasonable to infer that the workplace was made hostile to him because of his gender.

Id., 1997 WL 400219 at 14. *Cf. Andrews v. City of Philadelphia,* 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) ("[T]he intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course"); *Nichols v. Frank,* 42 F.3d 503, 511 (9th Cir. 1994) ("Sexual harassment is *ordinarily* based on sex. What else could it be based on?" [emphasis in original]).

D. Application of These Principles to the Instant Case.

The record developed in this case indicates that the sexual harassment perpetrated upon Joseph Oncale might be proved through any one of these three methods. Although he may not have specifically alleged that the perpetrators (or any one of them) were homosexual or bisexual, he certainly was threatened with homosexual rape.

The parties have agreed that there were no women working on the offshore drilling rig where the events took place, but it is entirely possible that, at trial, Mr. Oncale could present evidence that, when the perpetrators reported back at the home office for reassignment, for example, they did not harass or assault female co-workers as they had harassed and assaulted him. A jury also could reasonably conclude that a person engaging in conduct that is specifically sexual in nature is doing so for his or her own sexual gratification with respect to the victim -- and therefore because of his sex. Joseph Oncale should have the opportunity to offer his proof and let the finder of fact decide the factual issues presented by his case.

Conclusion

The court of appeals, in interpreting Title VII to exclude all same-sex harassment cases solely because of the gender of the harassers, ignored not only the plain language of the statute but the standard required for any grant of summary judgment. By holding that his coworkers' harassment of Joseph Oncale in sexually oriented ways was not and could not have been done "because of [his] sex" as a matter of law, the court precluded genuine factfinding on this crucial issue. The decision below should be reversed.

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association of

approximately 50,000 attorneys who primarily represent plaintiffs in personal injury, civil rights and commercial law cases. Letters of consent of the parties have been filed with the Court.[1]

ATLA believes that the refusal of the United States Court of Appeals for the Fifth Circuit to recognize any claim for same-sex sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e through § 2010 (1995), jeopardizes the national policy of nondiscrimination in employment and erodes the right of employees to be free from sexual and gender harassment in the workplace.

SUMMARY OF ARGUMENT

In enacting Title VII of the Civil Rights Act of 1964, Congress established a "national policy of nondiscrimination in employment" and "mandated equal access to employment and its concomitant benefits for female and male workers." H.R. Rep. No. 948, 95th Cong., 2d Sess. 3 (1978)(amending Title VII). Title VII "tolerates no. . . discrimination, subtle or otherwise." *McDonnell Douglass Corp. v. Green*, 411 U.S. 792, at 801.

[1] Pursuant to Rule 37.6, Amicus Curiae discloses that no counsel for a party authored any part of this Brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make any monetary contribution to the preparation or submission of this Brief.

The decision in *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996), offends Title VII's broad mandate and frustrates the national policy of nondiscrimination in employment. The decision departs from clearly established principles for inferring unlawful discrimination in favor of an arbitrary, illogical and unprecedented blanket ban on same-sex sexual harassment claims. The standard applied in *Oncale* affords unlawful discriminators an unwarranted reprieve from federal discrimination laws based merely on the discriminator's sex and without regard to the discriminator's actual discriminatory intent or the effect of the unlawful conduct. Amicus asks this Court to reject the holding in *Oncale*, reverse the Fifth Circuit and find that same-sex sexual harassment suits are actionable under Title VII.

ARGUMENT

The Fifth Circuit's decision in *Oncale* followed a line of precedent out of that circuit. In an unpublished decision, that court held that

> [h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.

Giddens v. Shell Oil Co., No. 92-8533 (5th Cir. Dec. 6, 1993).

In *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994), the court followed *Giddens* and held that the harassing supervisor's conduct "could not in any event constitute sexual harassment within the purview of

Title VII." Id., at 452. The Fifth Circuit's decision in *Garcia* was the first published federal appellate court decision to consider whether same-sex sexual harassment was actionable under Title VII. The Fifth Circuit also is the only court of appeal to rule that same-sex sexual harassment is not actionable in any context.

In *Oncale*, the Fifth Circuit again relied on the reasoning of *Giddens*, citing *Garcia* as binding precedent. Again, without differentiating between *quid pro quo* and hostile environment sexual harassment, the Fifth Circuit held that Title VII does not authorize same-sex sexual harassment claims.

I. Title VII Unambiguously Prohibits Discrimination Against Enumerated Categories of Employees Without Regard to the Category of the Alleged Harasser.

Title VII creates a "broad rule of workplace equality." *Harris v. Forklift Sys., Inc.*, 510, 522 U.S. 17 (1993). Subsection (a) of Title VII provides:

> It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a)(1).

Title VII does not distinguish between men and women, either as harassers or as plaintiffs. *See Doe v. Belleville*, --F.3d--, 1997 WL 400219, *4 (7th Cir. 1997);

Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 752 (4th Cir.), *cert. denied*, -- U.S. --, 117 S.Ct. 70 (1996). Neither the language nor the legislative history of Title VII indicates that an individual's right to pursue an action for sex discrimination is conditioned upon the sex of the harasser or the harassee. Title VII provides simply that it is unlawful to "discriminate against any individual. . . because of such individual's. . . sex. . . ." 42 U.S.C. § 2000e-2(a)(1)(1995).

In enacting Title VII, Congress did not provide only that it is illegal to discriminate against an individual of *another* race, or that it is illegal to discriminate against a member of the *opposite* sex. The language chosen unambiguously provides that anyone discriminated against because of sex may bring suit regardless of the particular protected category of the alleged discriminator.

Moreover, neither Title VII nor established precedent suggests that this Court should depart from Title VII's plain language in the context of a claim for sexual harassment. Although it was widely accepted that Title VII barred discrimination in economic aspects of employment, it was not until 1986 in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, that this Court held that an employer also discriminates within the meaning of Title VII when the employer fails to provide a work environment free from discriminatory intimidation, ridicule and insult.

According to the *Meritor* Court, "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women'' in employment,"

including requiring employees to work in a discriminatorily hostile or abusive environment. *Id.*, at 64.

In order to reach this conclusion, this Court drew upon principles developed in the racial harassment context. Specifically, this Court quoted with approval the Eleventh Circuit's decision in *Henson v. Dundee*, 682 F.2d 897, 902 (1982).

> "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Meritor, at 59 (quoting *Henson*).

That right "to work in an environment free from discriminatory intimidation, ridicule, and insult" extends to all of the enumerated categories of Title VII--race, color, religion, sex and national origin. *See, e.g., Meritor*, at 66 (citing *Rogers v. EEOC*, 454 F.2d 344 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *Firefighters Institute for Racial Equality v. St. Louis*, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied sub nom., Banta v. United States*, 434 U.S. 819 (1977); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976)(harassment and abuse of Jewish employee); *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977)(national origin)).

That right "to work in an environment free from discriminatory intimidation, ridicule, and insult" also extends to men as well as women. Both Congress and this Court have made it very clear that Title VII's prohibitions on sex discrimination apply to both genders. *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 682 (1983); 110 Cong. Rec. 2578(1964)(Title VII was intended to "cover white men and white women and all Americans.")(remarks of Rep. Celler)(cited in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976); *Barnes v. Costle*, 561 F.2d 983, 994 (D.C. Cir. 1977)("The legislative history similarly discloses a congressional purpose to outlaw any and all sex-based discrimination equally with any other form of discrimination which Title VII condemns.")(citations omitted). In fact, Title VII prohibits discrimination against members of any statutorily protected group, "'minority or majority.'" *McDonald, at* 279.

All evidence suggests that Congress did not specifically consider the possibility of a claim for same-sex sexual harassment when it enacted Title VII. It is widely known that "sex" was added to the enumerated categories in Title VII in order to make Title VII so unattractive to legislators that the proposed bill would not be enacted. *Meritor Savings*, 477 U.S. at 63-64.

Nevertheless, it is apparent from Title VII that Congress was intent on eliminating arbitrary and discriminatory barriers to employment. The mere fact that Congress did not address the instant issue and had an expressed desire to gut discriminatory employment practices does not "create 'a negative inference' limiting

the scope of [Title VII] to the specific problem that motivated its enactment." *Newport News*, at 679.

II. Neither the Gender, Nor the Sexual Orientation of the Alleged Harasser Is Sufficiently Probative to Bar An Inference of Sex Discrimination.

The Fifth Circuit's decisions in *Oncale*, *Garcia*, and *Giddens* apparently stem from its acceptance of a flawed premise that only opposite-sex or non-class members are able to create sexually hostile work environments. This premise is an unreasonably narrow, illogical and unprecedented interpretation of the scope of Title VII's protections.

This Court recently cautioned lower courts that it is improper to require a plaintiff to allege and prove facts which may be irrelevant to the ultimate issue of whether the plaintiff was the victim of discrimination. In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S.--, 116 S.Ct. 1307 (1996), this Court reminded federal courts that the imposition of arbitrary categorical burdens upon aggrieved employees without regard to the fundamental question of discrimination can only serve to deny individuals rights guaranteed by federal discrimination statutes.

In *O'Connor*, this Court made it exceedingly clear that in any claim under Title VII there must be a logical connection between the *prima facie* burden imposed upon a plaintiff and the prohibited discriminatory criteria. *Id.*, at 1310. *See also Doe*, at *19 ("it is ill-advised to make categorical assumptions about which factual scenarios

bespeak discrimination and which do not."). The right of any individual to pursue a claim for sexual harassment must always be premised on the simple question of whether the individual is able to offer evidence to support an inference of unlawful discrimination.

Nevertheless, the Fifth Circuit's decision in *Oncale* imposes an arbitrary categorical ban upon certain sets of plaintiffs claiming sexual discrimination. According to the Fifth Circuit, if a plaintiff has the misfortune of being harassed by a member of the same sex, then the plaintiff could not have been sexually harassed under Title VII.

The Fifth Circuit is alone in holding that Title VII bars all same-sex sexual harassment suits. The First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits have held, stated in dicta or have assumed without comment that Title VII permits same-sex sexual harassment claims. *See Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 192-93 (1st Cir. 1990); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 (3d Cir. 1977); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141-43 (4th Cir. 1996); *Yeary v. Goodwill Indus. Knoxvill, Inc.*, 107 F.3d 443, 447-48 (6th Cir. 1997); *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77, 1379 (8th Cir. 1996); *Steiner v. Showboat Oper. Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995); *Purrington v. University of Utah*, 996 F.2d 1025, 1028-31 (10th Cir. 1993); *Fredette v. BVP Management Assoc.*, 112 F.3d 1503 (11th Cir. 1997); and

Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981). Guidelines adopted by the Equal Employment Opportunity Commission ["E.E.O.C."] similarly interpret Title VII to permit suits for same-sex sexual harassment. II EEOC Comp. Man., CCH, § 615.2(b)(3) (Oct. 1981). As the Seventh Circuit recently concluded, "it is evident that *anyone* sexually harassed can pursue a claim under Title VII, no matter what her gender or that of her harasser." *Doe*, at *8 (emphasis added).

Similarly, the Fifth Circuit can find no company for its position in other Title VII contexts either. Generally, principles developed in other discrimination contexts are applicable to sex discrimination claims brought under Title VII. *See Meritor*, at 59 (drawing upon racial harassment principles).

It is settled that an employee's claim for race, national origin or religious discrimination is not barred by the mere fact that the alleged discriminator is a member of the same protected class. *Cf. Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609-10 (1987). Where "[t]he statute on its face treats each of the enumerated categories exactly the same," *Price Waterhouse v. Hopkins*, 490 U.S. 228, at 244 n.9 (1989), it is "untenable to allow reverse discrimination cases but not same-sex sexual harassment cases to proceed under Title VII." *E.E.O.C. v. Walden Book Co., Inc.*, 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995).

A number of courts, however, have imposed what appears to be a rebuttable presumption in same-sex sexual harassment suits. Namely, some courts presume that an employee cannot state a claim for same-sex sexual

harassment absent an allegation and offer of proof that the alleged harasser is a homosexual. *See, e.g., Wrightson*, at 141-42; *McWilliams*, at 1195 & n.5; *Fredette*, at 1504-05; *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, at 752 (4th Cir.), *cert. denied*, -- U.S. --, 117 S.Ct. 70 (1996); *McDonnell v. Cisneros*, 84 F.3d at 260; *Ward v. Ridley School Dist.*, 940 F. Supp. 810, 813 (E.D. Pa. 1996).

Still, those same courts do not permit an employer to defeat an opposite-sex sexual harassment claim by similarly rebutting the charge with proof that the alleged harasser is gay. *See Doe*, at *24. No court has ever linked the right of an aggrieved individual to recover for opposite-sex harassment to a demonstration that the harasser is heterosexual or even more particularly that the alleged harasser's conduct is driven by sexual desire.

Requiring allegation and proof of homosexuality confuses sexual attraction with sexual harassment and ignores the wide-scope of behaviors that are otherwise actionable as sexual harassment. *See Doe*, at *19; Deering, Christopher W., Comment, *Same-Gender Sexual Harassment: A Need to Re-examine the Legal Underpinnings of Title VII's Ban on Discrimination Because of Sex*, 27 Cumb. L.Rev. 231 (1997). As the Seventh Circuit noted in *Doe*, "[t]he focus on the sexual orientation of the harasser betrays a fundamental misconception that sexual harassment inevitably is a matter of sexual desire run amok--in other words, that the harasser is attracted to the victim and simply cannot restrain himself." *Id.*, at *22. *See also Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805 (N.D. Ind. 1995).

ATLA agrees that same-sex sexual harassment in which the harasser is motivated to some extent by sexual desire is logically indistinguishable from opposite-sex sexual harassment by a heterosexual male or female similarly motivated by sexual desire. ATLA also believes, however, that same-sex sexual harassment in which the harasser is motivated by sex discrimination other than sexual desire is logically indistinguishable from opposite-sex sexual harassment in which the harasser is similarly motivated.

Sexual harassment, like other types of discrimination under Title VII, comes in many forms. Sexual harassment certainly is not limited to those occasions when the harasser is driven by sexual desire. "Men sexually harass women in the workplace for reasons other than sexual desire; but that does not detract either from the sexual content of the harassment or from the uniquely intrusive and denigrating impact sexual harassment has upon the women who experience it." *Doe*, at *25; *See also* Shahan, Amy, Comment, *Determining Whether Title VII Provides Cause of Action for Same-Sex Sexual Harassment*, 48 Baylor L.Rev. 507 (1996). "[T]he relevant legal question" is whether the conduct at issue "is sufficiently patterned or pervasive, [to] comprise an illegal condition of employment under Title VII." *McKinney v. Dole*, 765 F.2d 1129, at 1139 (D.C. Cir. 1985); *See also Quick v. Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996); Thorpe, Joshua F., *Gender-Based Harassment and the Hostile Work Environment*, 1990 Duke L. J. 1361 (1990); H. Kay, *Sex-Based Discrimination* 535 (1988); 29C.F.R. § 1604.11(a).

Those courts that require allegation and proof of homosexuality ignore the discovery nightmares and ultimate shortcomings that necessarily attach to proving "homosexuality." After the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), courts of appeal have unanimously noted that individuals who engage in homosexual conduct are entitled to no special constitutional protection as either a suspect class or a quasi-suspect class "because the *conduct* which places them in that class is not constitutionally protected." *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261 (6th Cir. 1995)(emphasis added).

Nevertheless, if conduct is what makes an individual homosexual, at what point does conduct equate to class membership? How would a plaintiff prove that the harasser is homosexual? Would the plaintiff have to offer an admission that the supervisor desired to engage in homosexual sex with members of the same sex? If so, given the already substantial stigma that attaches to that admission, the requirement will gut Title VII rights for sexual harassment victims harassed by same-sex supervisors.

Absent an admission, what quantum of proof of homosexual conduct is sufficient to demonstrate homosexual class membership? If a supervisor engaged in homosexual behavior at one point in his life, does that make him a homosexual for purposes of a sexual harassment claim under Title VII at some other point?

What if the supervisor and co-workers held the plaintiff down, exposed themselves to the plaintiff and threatened the plaintiff with anal sex? Is that

"homosexual" conduct and does that conduct make the individuals members of the group of homosexuals?

More importantly, the sexual orientation of an alleged harasser cannot logically be determinative of a plaintiff's ability to bring a claim under Title VII. Rather than impose outright categorical bans on particular discriminatory scenarios, federal courts should adhere to the tests previously announced by this Court and the E.E.O.C. to determine whether or not an employer has created a sexually hostile environment. Those tests invariably focus on the nature, severity and impact of the challenged conduct and not on the sex of the perpetrator. *See Meritor*, at 64-65; 29 C.F.R. § 1604.11(a)("[V]erbal or physical conduct of a sexual nature constitute[s] sexual harassment when. . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.").

While a demonstration that the harasser was homosexual might help to support an inference of discrimination, the imposition of that affirmative burden is inconsistent with this Court's mandate in *O'Connor* and a plaintiff's right to work free of sexual harassment. "[T]he viability of a discrimination claim [must not] turn on arbitrary factors that do not capture the universe of actionable discrimination." *Doe*, at *21; *See also Quick*, at 1376-77, 1379.

III. The Fifth Circuit's Decision In *Oncale* Immunizes Employers Who Permit Homosexual Harassment of Employees From Liability Under Title VII.

The decision in *Oncale* necessarily ensures that individual same-sex sexual harassers and their employers are immunized from liability without regard to the conduct, its consequences, or the harasser's and the employer's discriminatory intent. Again, this outcome offends Title VII's broad policy of nondiscrimination and Title VII's obvious language. There is no basis in the statute for affording freedom from liability to employers who fail to ensure that the workplace is free of same-sex sexual harassment.

As discussed above, neither the language of Title VII nor its legislative history supports a conclusion that homosexuals who sexually harass were intended not to be covered by Title VII. The language and legislative history also do not support a conclusion that employees were expected to endure sexual harassment at the hands of homosexuals in the workplace.

Every federal court of appeal (except the Fifth Circuit) has held, assumed without deciding, or stated in dicta that a same-sex sexual harassment claim based on homosexual advances from a superior is actionable under Title VII. *See, e.g., Yeary*, 107 F.3d 443; *Fredette*, 112 F.3d 1503. Same-sex harassment motivated by sexual desire is logically indistinguishable from opposite-sex sexual harassment by a heterosexual male or female similarly motivated by sexual desire. *See, e.g., Doe*, at *24-25. As this Court stated in *Meritor*, "when a

supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex." *Id.*, at 64.

CONCLUSION

Amicus asks this Court to reverse the Fifth Circuit's order in *Oncale*. The Fifth Circuit's decision ignores the unambiguous language of Title VII and imposes an arbitrary and absolute barrier to discrimination claims under Title VII when the harasser is the same sex as the employee. There is no basis in Title VII, or this Court's interpretations of Title VII, to support the Fifth Circuit's categorical refusal to recognize same-sex sexual harassment claims.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOSEPH ONCALE,

Petitioner,

—v.—

SUNDOWNER OFFSHORE SERVICES, INCORPORATED; JOHN LYONS; DANNY PIPPEN; and BRANDON JOHNSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND; AMERICAN CIVIL LIBERTIES UNION; PEOPLE FOR THE AMERICAN WAY; NOW LEGAL DEFENSE AND EDUCATION FUND; WOMEN'S LEGAL DEFENSE FUND; GAY & LESBIAN ADVOCATES & DEFENDERS; NATIONAL CENTER FOR LESBIAN RIGHTS; NATIONAL WOMEN'S LAW CENTER; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC.; NORTHWEST WOMEN'S LAW CENTER; AND BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici include national and regional organizations dedicated to achieving equality under the law for lesbians and gay men: Lambda Legal Defense and Education Fund, The National Center for Lesbian Rights, Gay & Lesbian Advocates & Defenders, and Bay Area Lawyers for Individual Freedom.

Amici include organizations dedicated to supporting women's efforts to eliminate sex discrimination: NOW Legal Defense and Education Fund, The National Women's Law Center, The Women's Legal Defense Fund, Northwest Women's Law Center and Connecticut Women's Education and Legal Fund.

Amici include nonpartisan organizations dedicated to the protection of civil and constitutional rights: The American Civil Liberties Union and People for the American Way.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court. A complete list of *amici* and their statements of interest are set forth in Appendix A.

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[1]Counsel for the parties authored no part of this brief, and the expenses of its preparation and submission have been borne exclusively by Lambda Legal Defense and Education Fund.

SUMMARY OF ARGUMENT

The Fifth Circuit Court of Appeals affirmed summary judgment for Sundowner in this case, holding that there can never be a cause of action under Title VII for sexual harassment where the harasser and the harassed employee are of the same sex. This interpretation would have Title VII apply differently to exactly the same facts, conditioning liability on the sex of the harassed employee. *Amici* urge that this is a remarkable reading of a statute intended to *stop* practices that take sex into account, a reading that should be rejected here.

The statute's language and purpose would similarly be disserved by holding sexually harassing behavior actionable if consistent with a harasser's sexual orientation, yet finding exactly the same conduct exempt from coverage if the harasser's sexual orientation were different. Given that such a requirement has never been articulated in different-sex cases, this Court should reject Sundowner's argument.

Two concepts already embodied in the Court's prior rulings help alleviate the confusion that has surfaced in this case and others, over Title VII's application to same-sex sexual harassment. The first is that unwelcome sexual conduct imposed on employees is, *per se*, because of sex. No separate showing is required to establish that sexual harassment occurred because of sex; sexual harassment, by its very nature, takes sex into account and disadvantages its victims on that basis. The second critical concept is that the statute covers all adverse employment actions, in this case a hostile environment, that take gender into account (and that meet the other applicable requirements, such as severity or pervasiveness and employer liability). Such actions based on sex "discriminate" within the meaning of the statute, without the need for any further group-based or comparative showing,

because they rely on a factor that Title VII aims to banish from the workplace.

Sexual harassment jurisprudence rests on the recognition that a gender-based condition of employment is created when physical or verbal conduct of a sexual nature is so severe or pervasive as to create a hostile or offensive work environment, or as to interfere with an individual's performance. Sexual harassment can spring from myriad sources within the harasser-- some ascertainable and some not. In different-sex cases, the courts have correctly deemed irrelevant the complex personal well-spring for a particular harasser's behavior. Same-sex sexual harassment does not require the courts to delve into those factors any more than different-sex cases did. It is the inherently gender-based nature of sexual harassment that brings the conduct under the purview of Title VII, no matter the respective sexes or sexual orientations of the harasser or the harassed employee, and no matter whether the harasser's intentions are amorous or hostile. The language and the spirit of Title VII would be contravened by holding otherwise.

ARGUMENT

I. A PLAINTIFF ESTABLISHES THE ELEMENTS OF HOSTILE ENVIRONMENT SEXUAL HARASSMENT BY PROVING THAT HE OR SHE WAS SUBJECTED TO UNWELCOME VERBAL OR PHYSICAL CONDUCT OF A SEXUAL NATURE THAT WAS SUFFICIENTLY SEVERE OR PERVASIVE TO ALTER NEGATIVELY THE CONDITIONS OF HIS OR HER EMPLOYMENT.

This Court recognized a decade ago that the injection of unwelcome sexual conduct into the workplace -- whether

by demanding a *quid pro quo* or by creating a hostile environment -- is prohibited by Title VII in that it creates an adverse condition of employment because of sex. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-66 (1986). Whatever the sex of the harasser and the harassed employee, the principle that sexual conduct is *per se* related to the sex of the person or persons subjected to it is the gravamen of the sex discrimination inherent in sexual harassment.

To prove a hostile environment sexual harassment claim, a plaintiff must show that in the context of employment he or she suffered (1) verbal or physical conduct of a sexual nature[2] (2) that was unwelcome and (3) that was sufficiently severe or pervasive to affect the conditions of his or her employment negatively.[3] *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989); *see also Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990). By proving those three elements, a plaintiff necessarily shows that an impermissible factor -- sex -- has been used to impose disadvantageous terms of employment, thereby subjecting that individual to unlawful discrimination prohibited by Title VII.

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[2]Obviously, sexual conduct need not be shown where it is alleged that gender-based harassment, which need not be sexual to be actionable, violated Title VII.

[3] Of course, in all Title VII cases, some basis for employer liability, such as *respondeat superior* must also exist. Because that is an element common to all Title VII actions, it requires no separate consideration in this brief, nor need it be included in any test particular to sexual harassment claims. In addition, some courts impose a completely illusory requirement that the plaintiff show membership in a protected class, an element rendered meaningless by the fact that both men and women are protected by the statute. *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994) (criticizing the typical five-part test).

The determination that the discrimination occurs "because of sex" in sexual-harassment cases is based on the nature of the sexual conduct itself. Where sexual references or behavior are the basis of a harassment claim, no further evidence should be required to establish the link between the harasser's use of sex to create an abusive work environment and the harassed employee's gender. Some courts have purported to require a separate duplicative showing that the sexual harassment is imposed based on sex, but they err by doing so. Even these courts, however, correctly have readily found this separate because-of-sex "element" to be established (although usually without discussion) where men harass women sexually (or vice versa); it is only in cases involving harassers and harassed employees of the same sex that they erroneously have required additional proof. *Fredette v. BVP Management Associates*, 112 F.3d 1503 (11th Cir. 1997); *Hopkins v. Baltimore Gas and Electric Co.*, 77 F.3d 745, 752 (4th Cir.), *cert. denied*, 117 S.Ct. 70 (1996); *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir.) *cert. denied*, 117 S. Ct. 72 (1996); *Wrightson v. Pizza Hut*, 99 F.3d 138 (4th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996).

An understanding of how a plaintiff shows "discrimination" and "because of sex" in a sexual-harassment case is critical to the issues that have confused the circuit courts in same-sex sexual harassment cases. *Amici* therefore first address the meaning of the concepts "because of sex" and "to discriminate" in Title VII.

A. Conduct Of A Sexual Nature Is Inherently "Because Of Sex."

Gender is powerfully rooted in all sexual behavior, in the workplace as elsewhere. To the recipient, unwelcome sexual overtures or sexual abuse can never be divorced from

gender. "In each case, the victim's gender not only supplies the lexicon of the harassment, it affects how he or she will experience that harassment..." *Doe v. City of Belleville*, No. 94-3699, 1997 U.S. App. LEXIS 17940, at *45 (7th Cir. July 17, 1997).

Environmental sexual harassment makes a condition of employment the endurance of severe or pervasive gender-based intimidation and humiliation.[4] By barraging an employee with "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature," 29 C.F.R. § 1064.11(a), a harasser exposes the victim's gender in sharp relief, degrading the employee based on his or her particular gender. Overtly sexual conduct inevitably plays off of the victim's sex and thus establishes sex as a substantial factor in the creation of such adverse working conditions.[5]

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[4]The Equal Employment Opportunity Commission (EEOC) guidelines on sexual harassment, 29 C.F.R. § 1604.11 (1997), describe the range of behavior addressed by the statute as follows: "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." The guidelines go on to explain that such conduct will rise to the level of actionable sexual harassment if submission to it is a condition of employment, if submission to or rejection of such conduct is the basis for employment decisions, or if "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.*

[5]This stands in marked contrast to instances of "bad behavior" that do not directly invoke the invidious bases enumerated in Title VII (such as when an employer, with no reference or allusion to an employee's race, religion, sex, or national origin, is gruff, unpleasant, harsh, quick tempered, a strict disciplinarian, or the like). In such a case, if a plaintiff alleges that the employer has created an environment violative of Title VII by that behavior, other evidence proving a connection to at least one prohibited basis will be required.

When sexual propositions, innuendo, or derogatory sexual language is used, the intent to discriminate is implicit. *Andrews v. City of Philadelphia*, 895 F.2d at 1482 n.3. The interchangeable uses of the term "sex" to refer to the panoply of intimate acts and to refer to a person's gender is not coincidental in the sexual-harassment context, nor is it beside the point. It is indicative of the deep connection between the two. Sexual words or conduct can be conveyed, as well as received, only in the context of a person's particular sex (gender). Thus, sexual conduct has its meaning and effect "because of sex."[6] *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994) ("[S]exual harassment is *ordinarily* based on sex. What else could it be based on?") (emphasis in original).

In its first direct ruling on same-sex sexual harassment, the Seventh Circuit recently adopted this very principle in a comprehensive and thoughtful opinion. *Doe v. City of Belleville*, No. 94-3699, 1997 U.S. App. LEXIS 17940, at *45 (7th Cir. July 17, 1997). The court reasoned:

> [W]e have difficulty imagining when harassment of this kind would not be, in some measure, 'because of' the harassee's sex -- when one's genitals are grabbed, when one is denigrated in gender-specific language, and when one is threatened with sexual assault, it would seem impossible to de-link the harassment from the gender of the individual harassed.

Id. at *51. The court found that the sexual nature of the harassment imposed by men on two teenage boys constituted

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[6]Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1456 (1984) ("[B]y definition, sexual harassment occurs because of the harassed employee's sex... ").

sex discrimination, and commented at length on the gender basis inherent in any harassing sexual acts. *Id.*

Whether unwelcome physical or verbal conduct of a sexual nature is imposed upon an employee to exact a *quid pro quo*, or to create a hostile work environment, it imposes a gender-based employment condition. In each instance, the sexual conduct itself establishes the connection to gender.

B. "Discriminate," In Title VII, Means To Use Any Of The Enumerated Characteristics As A Factor In Making Employment Decisions Or Establishing The Conditions Of Employment.

A finding of discrimination under Title VII requires nothing more than the use of an impermissible factor in an employment action. "Congress' intent" in enacting Title VII was "to forbid employers to take gender into account in making employment decisions[.]" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989). Sections 2000e-2(a)(1) and (2) "mean that gender must be irrelevant to employment decisions." *Price Waterhouse* at 240. Thus, once a plaintiff has proven that an employer acted "because of such individual's ... sex," 42 U.S.C. § 2000e-2(a)(1), that plaintiff also has established discrimination with respect to Title VII's use of the term "to . . . discriminate." The notion of discrimination in this statute does not introduce some additional element above and beyond proof that gender *was* impermissibly taken into account in refusing to hire, in firing, or in creating hostile working conditions (as in the present case). As the Court emphasized in *Meritor*, "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor*, 477 U.S. at

64.[7]

Sundowner mistakenly assumes that Title VII's reference to discrimination, in defining unlawful employment practices, requires that an individual being sexually harassed show that he or she is being subjected to unwanted sexual conduct that inherently uses his or her gender as a factor to set up hostile work conditions *and* additionally show that those of a different sex are not also being subjected to parallel conduct. However, the concept of "discrimination" embodied in Title VII does not require the second, additional showing.

Title VII's prohibition of certain employment practices clearly includes a number of situations that are not dependent upon a showing that one group was disadvantaged and others not. The use of gender stereotypes is a violation of Title VII (*Price Waterhouse*, *supra*), for example, and this

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[7]That comparative evidence is not a necessary element of all Title VII claims is shown by the very structure of § 2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer -- (1) to fail or refuse to hire, or to discharge, *or otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (emphasis supplied). If there were some separate proof requirement invested in the word "discriminate," surely Congress would have drafted the provision so that this word was directly tied to claims arising out of hiring and firing decisions as well. The statute unambiguously states that a decision to fire or not to hire an individual because of any one of the impermissible factors establishes an unlawful employment practice; the word "discriminate" and phrase "otherwise to discriminate" are only included as a catch-all phrase for other uses of those invidious factors "with respect to ... compensation, terms, conditions, or privileges of employment."

would be true even if both men and women were subjected to stereotypes about their sex. Having sex-segregated want ads likewise constitutes sex discrimination even though *both* men and women are thereby discouraged from applying for certain jobs. *Ruhe v. Philadelphia Enquirer*, 14 Fair Empl. Prac. Cas. (BNA) 1304, 1305 (D.C. Pa. 1975). Taking an adverse job action against an employee because of the employee's association with someone of a different race similarly violates Title VII, even if the employer penalizes *both* white and non-white employees who are in interracial relationships. *See Watson v. Nationwide Insurance Co.*, 823 F.2d 360, 361-2 (9th Cir. 1987); *Parr v. Woodmen of the Word Life Ins.*, 791 F.2d 888, 892 (11th Cir. 1986); *Reiter v. Central Consol. Sch. Dist.*, 618 F. Supp. 1458, 1460 (D. Colo. 1985); *Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442, 1445 (N.D. Ga. 1984). Workplace segregation may present the starkest example of prohibited "discrimination" that occurs (*see Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); *Rogers v. EEOC*, 454 F.2d 234, 238-39 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)), even though *all* employees are subjected to the segregation.

In the same way, an employer who repeatedly fondles a female employee's breasts and often grabs a male employee's testicles, or a supervisor who rapes or exacts a sexual *quid pro quo* both from a male employee and a female employee, has sexually harassed and thereby engaged in discrimination based on sex as to two employees, not none. Even the very same conduct, such as rape, uses and plays on an employee's male or female sex differently, and relies upon each specific victim's gender to demean and disadvantage him or her, individually, in the workplace. *See also infra*, section II(D).

II. ALL OF THE LIMITATIONS ON TITLE VII'S COVERAGE THAT SUNDOWNER SEEKS TO IMPOSE ARE PRECLUDED BY THE LANGUAGE AND LOGIC OF THE STATUTE.

A. The Statute Applies Regardless Of The Respective Sexes Of The Harasser And The Harassed Employee.

Title VII protects male as well as female employees, *Newport News Shipbuilding & Dry Dock Co. v. EEOC.*, 462 U.S. 669, 681-82 (1983), and it does so without regard to the race, color, religion, sex, or national origin of the person who takes the adverse action against the employee. *Belleville*, 1997 U.S. App. LEXIS 17940 at *26. It is not surprising that the statute does not distinguish among employees' claims based on their sex, or other characteristics, given that the statute reflects "the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins*, 490 U.S. at 237 (1989).

Throughout the history of Title VII, this Court has applied the plain meaning of the statute to countenance no distinctions in the application of its standards based on race, sex, religion or national origin. *See, e.g., McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) ("Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable as were they Negroes. . . .").

This remains true in the many instances in which employers of one race, religion, sex or national origin are charged with discriminating in violation of Title VII against another of the same race, religion, sex, or national origin. *See*

Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 624-26 (1987) (in sex-discrimination case brought by male plaintiff attacking decision to promote female applicant instead of him, this Court attached no significance to the fact that the promotion decision was made by another male); *Wilson v. Bailey*, 934 F.2d 301 (11th Cir. 1991) (considering male plaintiffs' sex discrimination claims without objection that relevant employment decisions were made by other men); *Veatch v. Northwestern Memorial Hospital*, 730 F. Supp. 809 (N.D. Ill. 1990) (assertion that plaintiff has no claim of sex discrimination because the firing decision was made by another woman reflects a misunderstanding of the laws against discrimination and the evils they were enacted to combat); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 708 (6th Cir. 1985) (Christian allowed to sue Christian employer for religious discrimination); *Hansborough v. City of Elkhart Parks and Recreation Dep't*, 802 F. Supp. 199, 201, 206 (N.D. Ind. 1992) ("intraracial discrimination," such as "discrimination by a black individual against another black individual because of the fact that he is a black person," is actionable under Title VII). Given the unfortunate fact that human beings may discriminate against their own kind, *Castaneda v. Partida*, 430 U.S. 482 (1977), the goal of eliminating consideration of the impermissible factors from the workplace would be subverted, and the statute's own terms contradicted, if the viability of a claim turned upon the sex (*i.e.*, gender) of the parties.

B. The Statute Applies Regardless Of The Sexual Orientation Of The Harasser.

1. Potential Sexual Attraction Is Not Required To Connect Sexual Behavior And Gender.

Like the overwhelming number of lower courts that have considered different-sex sexual harassment cases, this Court has seen no need for evidence that the harassers whose conduct resulted in lawsuits acted consistent with their sexual orientation as a necessary precursor to Title VII liability. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Nor have different-sex sexual harassment cases involved any showing that the men who harassed actually considered themselves to be heterosexual. Clearly, the language of Title VII, as correctly applied in the different-sex scenarios, does not hinge liability on proven sexual attraction or on the perpetrator having a particular sexual orientation, and no such limitations should be applied here.[8] *Burns v. McGregor*

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[8] Moreover, even if sexual harassment did require libidinous intent, some men who consider themselves gay nonetheless are sexually attracted to some women and may act upon that attraction, without this changing their self-definition. *See* Alan P. Bell & Martin S. Weinberg, *Homosexualities: A Study of Diversity Among Men & Women* 54-55 (1978) (reporting study results showing that almost two-thirds of men who considered themselves gay had engaged in heterosexual coitus at least once in their lives and that 14 to 22 percent of self-defined gay men had engaged in heterosexual coitus in the year prior to interview).

Likewise, "[m]any people who have had same-sex sexual experiences do not label themselves gay or lesbian...." *Developments in the Law - Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, n. 1 (1989); Edward O. Laumann, et al., *Homosexuality* in *The Societal Organization of Sexuality* 283, 287-301 (1994) (reporting survey findings of "sizable groups who do not consider themselves to be either

Electronic Industries, 955 F.2d 559 (11th Cir. 1992); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

Sundowner's reliance on Oncale's purported failure to rebut Lyons', Pippin's and Johnson's heterosexuality, Opp'n Cert. at P.15, demonstrates how a focus on sexual orientation undermines the statute's aim of ending employment practices that are, in whole or in part, based on the employee's sex. Requiring sexual harassment to be consistent with the harasser's sexual orientation would shift the focus of the inquiry from the one mandated by Title VII, namely the harasser's use of the sex of the employee, to the sexual desires and identity of the harasser, a factor irrelevant to its mandate.

Indeed, Sundowner's discussion of heterosexuality and its supposed function as a defense illustrates that explicitly sexual words or behavior cannot be divorced from gender. In relying on the harassers' sense of themselves as heterosexual men to assert that their behavior was not sexual harassment, *Sundowner places critical reliance on Oncale's gender*. Confusing sexual desire with "because of sex," it argues that the harassers' grossly sexual behavior, like exposing themselves and putting their penises on Oncale's body, would be sexual harassment only if they were gay because, Sundowner assumes, in that case the men's behavior would have been undertaken to gratify sexual desire. Opp'n Cert. at P.10. Thus, Sundowner claims that the harassers' heterosexuality -- and *Oncale's status as a man* -- means that

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homosexual or bisexual but [who] have had adult homosexual experiences or express some degree of [same sex] desire").

the behavior was not "because of sex."[9] Sundowner's argument concedes that sexual behavior is so inextricably related to gender that the two cannot be divorced, for Sundowner's own gloss on the harassers' behavior -- that it is not covered by Title VII because as heterosexual men their conduct must not have been motivated by desire -- turns on Oncale's sex.

2. The Harasser's Reason For Engaging In Sexual Conduct Is Irrelevant.

This Court has not inquired into harassers' or harassees' sexual orientations, or the thoughts or feelings that a harasser might have had in using sexual conduct. This lack of inquiry establishes the irrelevance under Title VII of the personal psychosocial make-up of individuals who sexually harass. A person who, for whatever complex internal reason, decides to interfere with an employee's performance, or creates a hostile environment by imposing unwelcome sexual conduct is a person who has taken action and disadvantaged another because of sex. *Belleville*, 1997 U.S. App. LEXIS 17940.

A harasser's personal impetus for his conduct is totally irrelevant to liability for sexual harassment. *See International Union, UAW v. Johnson Controls,* 499 U.S.

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[9] Of course, neither the harassers' marital status, nor their asserted heterosexuality alters the highly sexual nature of conduct like Lyons' placing his penis on Oncale's neck and arm, or the men forcing a bar of soap into his buttocks, or anus, while threatening that they were preparing to rape him. Nor does any of the men's status change that they each engaged in sexual conduct with and in the company of men, at the expense of Oncale's employment.

187, 200 (1991) ("The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination . . ."); *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1515 (D. Me. 1991) ("laws prohibiting racial and sexual harassment are wholly uninterested in the perpetrator's intent. Victims need establish neither the fault or the discriminatory intent of their employers and co-workers to succeed under Title VII....").

Sexually harassing conduct equally violates the statute if the harasser acts out of disgust and animus just as if he acts out of misplaced desire.[10] Individuals who engage in sexual harassment may have different purposes; one may wish to "gratify his sexual desires" while another may seek "to subordinate women, to remind them of their lower status in the workplace, and to demean them." *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 897-98 (9th Cir. 1994). "Men sexually harass women in the workplace for reasons other than sexual desire; but that does not detract either from the sexual content of the harassment or from the uniquely intrusive and denigrating impact sexual harassment has upon the women who experience it." *Belleville*, 1997 U.S. App. LEXIS 17940 at *86.

This Court's two sexual harassment cases illustrate the

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[10] Indeed, many male harassers of women no doubt believe their sexual attentions to be complimentary and would claim to hold their victims in high esteem. *Pease v. Alford Photo Indus.*, 667 F.Supp. 1188, 1190 (W.D. Tenn. 1987) (finding liability for harassment where the perpetrator thought his acts were merely "the friendly acts of an employer"); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 Am. Psychol. 497, 499 (1991) (noting that conduct that women generally perceive as sexual harassment will not necessarily be perceived as such by men, who may consider it ordinary social interaction); Gary N. Powell, *Effects of Sex Role Identity and Sex on Definitions of Sexual Harassment*, 14 Sex Roles 9 (1986).

point. In *Meritor*, which involved ongoing sexual relations between the parties, the harasser might have said he was motivated by admiration or desire, while in *Harris*, which involved derogatory sexual comments, the harasser claimed only to be joking. Yet no relevance was attached to these varying personal interests, because the conduct of the harassers demonstrated the only fact necessary: it was based on the sex of its victims.

3. A Sexual Orientation-Based Test For Liability Is Not Only Completely Without Foundation In The Statute, It Would Wreak Havoc As An Evidentiary Matter.

Amici urge adoption of the analysis set forth above because it is consistent with the statute, with this Court's decisions interpreting Title VII, and with the pertinent constitutional limitations. Another factor further compels a finding against hinging liability on the harasser's sexual orientation: the horrendous quagmire of evidentiary and definitional problems that would be raised by a test specific to the internal sexual and sexual orientation-related perspective of the harasser.

For example, in the instant case, if Sundowner's submission of evidence that Lyons is married to a woman is relevant to its culpability because it is sought to be offered as circumstantial evidence that he did not act against Oncale out of sexual desire, then would evidence that he was sexually aroused when he assaulted Oncale affect a finding of liability? Should it? Is a person's self-definition as to sexual orientation rebuttable? In different-sex cases, would men or women accused of harassment be absolved if they (or their employers) are willing to say they are gay, lesbian or bisexual? Would same-sex experience need to be

substantiated? Would attraction suffice? A sexual orientation-based test would make relevant the most elusive, private aspects of alleged harassers' (and sometimes harassees') lives, histories, and thoughts.

As argued above, the assumption that sexual attraction, or potential sexual attraction, determines whether the same acts are or are not "because of sex" is a fallacy. However, a further fallacious assumption follows from adopting that approach: that only people who call themselves "gay" or "lesbian" experience attraction to those of the same sex, and that only those who consider themselves "heterosexual" experience attraction to those of a different sex.[11] Sexual attraction, and the designation of sexual

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[11]Having courts or juries attempt to make a definitive factual determination regarding a person's sexual orientation, much less his or her capacity for sexual attraction in a specific instance, would be a highly problematic exercise. Sexual orientation is a complex construct, involving elements of desire, behavior, community and identity. *See* Edward O. Laumann, *et al.*, "Homosexuality," in *The Social Organization of Sexuality*, 283, 287-301 (1994) ("homosexuality is fundamentally a multidimensional phenomenon"); Gregory M. Herek, *Myths about Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law & Sexuality 133, 134-35 (1991) (discussing different aspects of human sexuality that are contained within the rubric of sexual orientation); John P. DeCecco, *Definition and Meaning of Sexual Orientation*, in *Philosophy and Homosexuality* 51, 64 (Noretta Koretge, ed. 1985) (reviewing studies and concluding that "sexual orientation ... is a tapestry far richer and more intricate than we have imagined"); *see also* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 U.C.L.A. L. Rev. 263 (1995) (comparing difficulties in fact-finding regarding a litigant's race and a litigant's sexual orientation).

If a defendant's liability hinged on the harasser's sexual orientation or on the even more difficult-to-prove presence of sexual attraction in a given instance, obviously the harasser's own statements on those issues could not be seen as definitive proof. This is in marked contrast to the situation faced by gay or lesbian plaintiffs, or those perceived to be gay, in cases completely distinct from the one at hand.

orientation, are far more complex and variable than allowed for by such an assumption. Conditioning Title VII liability on a finding concerning a harasser's potential for sexual attraction to a person of a particular gender would legitimize extraordinarily broad, unsavory inquiries and result in many employers escaping liability.

C. Employers In Single-Sex Environments Are Not Immunized From Liability.

Sundowner also advances the implausible suggestion that because there were no women at Oncale's job site, Oncale cannot make out the elements of a sex-discrimination claim. Opp'n Cert. at 13. This argument rests on the flawed premise that Oncale needs to show that women were in fact, or would have been, treated differently by the employer to prove that *he* suffered discrimination because of sex. As explained above at I(B), this reflects a misunderstanding of the statute's use of the term "discriminate."

Comparative evidence is an evidentiary tool that individual plaintiffs may use in some Title VII cases to show that the adverse action suffered was because of the employee's sex.[12] As this Court has indicated, however, it is

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There, self-identification or the perception of others is sufficient proof as to the sexual-orientation component of the case. (More facts would be necessary, of course, in any such case to prove a plaintiff's claim, but here a complete defense to liability is contemplated.)

[12] The *McDonnell-Douglas* burden-shifting paradigm, which frequently leads plaintiffs to employ comparative evidence, was crafted to permit an inference of an impermissible motive in the very different situation where there is no direct evidence that the adverse action was really taken based on race, color, religion, national origin, or sex. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the McDonnell Douglas prima facie

not the only way to do so.[13] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Racial slurs, for example -- or even racial symbols, references, cartoons or jokes that allude to race -- demonstrate *by themselves* that a hostile environment occurred "because of race" or national origin.[14] Indeed, in *Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250, 1258 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986), the Sixth Circuit squarely rejected an argument that a racial

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case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); *Perry v. Kunz*, 878 F.2d 1056, 1059 (8th Cir. 1989) ("the McDonnell Douglas test was designed merely to aid in discovering discrimination where only circumstantial evidence is available"). However, this paradigm does not apply in sexual harassment cases, where the reliance on an impermissable factor, sex, is directly and conclusively established by the conduct itself. *See Cline v. General Electric Credit Auto Lease*, 748 F. Supp. 650 (N.D. Ill. 1990).

[13] Where, as here, no inferential proof is necessary because the plaintiff presents direct proof that an impermissible factor was present in her treatment, circumstantial evidence merely supplements the initial showing. Its absence cannot defeat plaintiff's claim. *See, e.g., Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir. 1994) ("If there is direct evidence that an employer placed substantial negative reliance on an illegitimate criterion in reaching an employment decision, however, resort to inferential methods of proof is unnecessary."); *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2d Cir. 1989) (direct evidence of discrimination makes resort to circumstantial evidence unnecessary); *Perry v. Kunz*, 878 F.2d 1056, 1059 (8th Cir. 1989) (same).

[14] *See, e.g., Boutros v. Canton Regional Transit Authority*, 997 F.2d 198, 205 (6th Cir. 1993) (references to Arab plaintiff as a "camel jockey," a "rich Arab," and as unable to drive because he had no motor vehicles where he came from were indisputably national origin based, and not based on personal characteristics); *Ways v. City of Lincoln*, 871 F.2d 750 (8th Cir. 1989) (racially offensive jokes, comments and actions directed at plaintiff's Black and Native American heritage stated claim of hostile work environment); *Snell v. Suffolk County*, 782 F.2d 1094 (2d Cir. 1986) (racial harassment and ethnic slurs demonstrated a racially hostile environment against both Blacks and Hispanics).

harassment plaintiff (under section 1981) needed to demonstrate differential treatment relative to whites. There, the defendant presented evidence that the plaintiff, a Mexican-American, had himself engaged in racial harassment of his white supervisees (777 F.2d at 1252) but the court nevertheless found for the plaintiff. The court noted: "[R]equiring in all cases a demonstration that an employer treated harassment claims of minority employees differently from those of white employees would erode severely the important protections courts have recognized under section 1981." *Id.* at 1258.

Finally, to argue that "discrimination" requires a group-based showing of comparative mistreatment in addition to a demonstration that an individual suffered an adverse job consequence because of his or her sex contravenes the terms and policy of the statute. 42 U.S.C. 2000e-2(a)(1), the basis for a sexual harassment claim, prohibits certain actions taken against individuals. As this Court has noted, "the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 709 (1978).

D. The "Equal Opportunity Harasser" Is A Red Herring, And The "Problem" It Presents Is Not Particular To Same-Sex Cases.

As discussed above, from the earliest days of the statute's enforcement, courts easily determined that, even if different groups receive identical treatment, Title VII is violated where employers openly act on the basis of race or sex (except in the rare instance that there is a *bona fide* occupational qualification). Nevertheless, in sexual harassment cases some courts have stumbled on the notion

that an "equal opportunity harasser" (sometimes, even more absurdly, called a "bisexual harasser") does not subject his or her victims to harassment because of each one's sex.

Once it is understood that "discrimination" against *both* men and women is not impossible, and that harassing sexual conduct always implicates the gender of the harassed employee, it becomes clear why "equal opportunity" harassment can provide no safe harbor from liability. Even where a harasser affects members of both genders with equal use of sexual epithets, innuendo, touching, unwanted advances, and sexually degrading behavior, the status of the harassee as a man or a woman is "inextricably intertwined" in the sexual form the harassment takes, as well as its impact on the harassee. *Belleville*, 1997 U.S. App. LEXIS 17940 at *45. Each instance of sexual harassment must be judged individually from the victim's perspective; if a supervisor sexually harasses a male and a female worker, the result is not that he is liable to neither, but that he is liable to both.[15] *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D.Wy. 1993).

A person who sexually harasses both a man and a woman discriminates against each, in the same way that a person can, for example, limit the employment opportunities

[15] *Cf. Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037, 1043 (7th Cir. 1994)("That conduct is egregious enough to offend the sensibilities of men as well as women cannot serve to immunize it for Title VII purposes."); *Woods v. Graphic Communications*, 925 F.2d 1195, 1198, 1202 (9th Cir. 1991) (finding violation as to African-American employee where workplace polluted with "forms of hostility directed at almost every conceivable racial and ethnic group"), *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989) (holding that it is no defense to assert that workplace conditions were equally offensive to men and women).

of both men and women by applying sex-based stereotypes to each.[16] Unfortunately, it is all too possible to discriminate against different individuals based on each person's particular sex, race, national origin, or religion. By illustration, evidence that an employer targeted members of many different groups for race-based harassment -- calling Hispanic employees "spics," whites "crackers," and Asians "chinks," for example -- would not render an employer immune from liability.[17] An individual employee's gender is no less demeaned by sexual harassment if an employer subjects members of both sexes to pervasive sexually-based ridicule, innuendo, and uninvited attentions.

[16] *See, e.g., McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996) (pointing out that an employer's sexual harassment of men and of women in the workplace would be actionable by each, because each would experience harassment that was based in their status as a man or a woman)(Posner, J.) *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D.Wy. 1993) ("[E]qual harassment of both genders does not escape the purview of Title VII in the instant case. Where a harasser violates both men and women 'it is not unthinkable to argue that each individual who is being harassed is being treated badly because of gender'").

[17] *See, e.g., Steiner v. Showboat Operating Company*, 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995) (where defendant defended with the assertion that the harasser abused everyone in the workplace, "we do not rule out the possibility that both men and women working at Showboat have viable claims against Trenkle for sexual harassment").

E. The Employer Is Not Immunized From Liability For Sexual Harassment If The Harassed Employee Is, Or Is Perceived To Be, Gay Or Lesbian.

The sexual orientation of a harassed employee is also irrelevant to determining whether sexual harassment is actionable. Perception of lesbian or gay sexual orientation may contribute to same-sex harassment in some cases, (*see, e.g.*, *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996); *Belleville*, 1997 U.S. App. LEXIS 17940 at *95-96 (collecting cases)), but that is not a defense because gender need only be a factor in the adverse treatment for it to be actionable as discrimination, and gender and sexual orientation, particularly in the context of sexual harassment, are inextricably linked. *See*, *e.g.*, *supra*, at section II(B)(1). The *Belleville* court pointed out that "it is not always possible to rigidly compartmentalize the types of bias that [sexist and homophobic] epithets represent," *Belleville* at *96. Further, it should not make "a whit of difference why [the plaintiff in *Belleville*] was singled out for abuse; whether his harassers were motivated by his sex, by his purported sexual orientation, or by some other factor, it would seem that he has been harassed sexually and his gender necessarily implicated." *Belleville*, 1997 U.S. App. LEXIS 17940 at *94-95.

Sexually harassing conduct is not stripped of its connection to sex when the harasser alleges or proves that he acted as he did because of homophobia.[18] Some harassers may

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[18] In the present case, as in any sexual harassment case, the presence of indisputably sexual behavior establishes the requisite connection to sex (gender). In other cases, gender-based conduct that is

claim that they harassed a person sexually because of the color of her eyes, or hair, or her figure, example. Obviously this would not by itself render the harasser's sexual conduct lawful. The fact that a sexual harasser might have been "inspired" by a different factor does not alter that the harassment violates Title VII if it invokes sex to create a sexually abusive environment.[19]

Of course, sex (both meanings) and sexual orientation are closely related. "Homosexuality," like "heterosexuality," cannot even be defined without reference to both sex (gender)

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demeaning or abusive can invoke gender albeit not in sexual terms. *See e.g.*, *King v. Hillen*, 21 F.3d 1572, 1583 (Fed. Cir. 1994); *Kopp v. Samaritan Health Systems, Inc.*, 13 F.3d 264, 269 (8th Cir. 1993); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482, n.3 (3rd Cir. 1990).

[19] Just as there is non-sexual gender-based conduct, there is also sexual-orientation discrimination that is not sexual harassment. *Amici's* position in this case that sexual harassment is *per se* because of sex, and that Title VII liability for otherwise actionable sexual harassment is not defeated whenever sexual orientation is introduced as a factor, does not touch on the question of whether or under what circumstances non-sexually harassing discrimination based on sexual orientation might so profoundly turn on sex as to violate Title VII. This Court has never addressed that question, and it should not do so in this context. Some lower courts have held that Title VII does not address sexual orientation discrimination, *see, e.g., DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978) (holding discrimination against "effeminate" males not sex discrimination; arguably overruled by *Price Waterhouse*). But *see Macauley v. Massachusetts Comm'n Against Discrimination*, 397 N.E.2d 670, 671 (Mass. 1979) ("As a matter of literal meaning, discrimination against homosexuals could be treated as a species of discrimination because of sex. . . . [H]omosexuality is . . . sex-linked."). The present case does not present these questions, arising as they do outside the sexual harassment context, and this Court should not attempt to answer them here.

and sexuality; it is the gender of one's preferred sexual partner that denotes sexual orientation. Further, gender stereotyping is often associated with homosexuality. These connections make particularly broad and untenable Sundowner's proposal to exempt from coverage of any sexual harassment that a harasser suggests is tainted by a connection to the victim's or the harasser's sexual orientation.[20] For instance, it is clear that an employer violates Title VII if it denies advancement to a woman because she is insufficiently feminine. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 255-56 (1989). An employer should not be able to immunize itself from liability for sexual harassment by calling her a lesbian. Nor should a male employee's unwelcome sexual advances be rendered beyond Title VII's reach if he claims to have been provoked by his belief that his victim is a lesbian.

III. EXEMPTING SAME-SEX SEXUAL HARASSMENT FROM TITLE VII'S COVERAGE WOULD BE INCONSISTENT WITH THIS COURT'S EQUAL PROTECTION JURISPRUDENCE.

Official classifications based on sex are subject to heightened scrutiny under the Court's equal protection analysis. "The burden of justification is demanding and it rests entirely on the State. The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *U.S. v. Virginia*, 116 S.Ct. 2264, 2275 (1996) (internal

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[20] *See* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 Geo. L.J. 1, 32 (1992) ("By its nature, sexual harassment is an attack that involves the sexuality of the victim.")

citations and quotations marks omitted).

It is also well settled that this heightened standard of equal protection review applies not only to classifications that disadvantage women, but also to classifications that appear to advantage women or disadvantage men. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding unconstitutional, under heightened scutiny, peremptory challenges exercised to exclude male jurors); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (finding, under heightened scrutiny, that nursing school's exclusion of men violates the Equal Protection Clause); *Craig v. Boren*, 429 U.S. 190 (1976) (striking state law that imposed disparate drinking ages for men and women); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) (striking federal statute that provided disparate social security benefits to widows and widowers).

To dismiss Oncale's claim because he is a man rather than a woman, as the Fifth Circuit did, is to hold that Title VII claimants should be treated differently, based solely on their sex, without any support for such a result in the statutory language. It is no answer to maintain that the excluded "same-sex harassment" would not create a sex-based classification because it exempts members of each sex, equally, from establishing liability for sexual harassment by a perpetrator of the same sex. This Court rejected that analytic canard in *Loving v. Virginia*, 388 U.S. 1 (1967).

It presents the same problem to add a spurious sexual-orientation element, such as Sundowner advocates, only to same-sex sexual harassment cases. For example, under such a test, a female employee who is harassed by another woman would have a different and more onerous evidentiary burden than a similarly situated male victim, solely because of her sex: she would have to further prove the sexual orientation of her harasser, whereas for the male victim harassed by a

female such proof would be unnecessary. Conversely, a male employee who is harassed by another man cannot properly be required to satisfy a different and more stringent standard than a similarly situated woman just because he is male.

Moreover, even if the sexual-orientation requirement were now to be added to all claims, including those of different-sex sexual harassment, the problem would resurface in another way. Were such a new element of proof introduced, a female employee who was harassed by a lesbian would be protected under Title VII, but a male employee subject to the same conduct by the same harasser would be excluded from protection based on his male sex. Likewise, a male employee harassed by a gay man would be protected, but a female employee subject to the same conduct by the same harasser would not. This is all contrary to the spirit of Title VII *and* equal protection principles.

CONCLUSION

This Court should reverse because the Fifth Circuit's determination that no Title VII cause of action is stated where a man alleges sexual harassment by male harassers is contrary to this Court's sexual harassment and Equal Protection jurisprudence, and to Title VII's terms, its purpose, and its spirit.

Respectfully submitted,

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APPENDIX A

Lambda Legal Defense and Education Fund ("Lambda") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men and people with HIV/AIDS, through impact litigation, education and public policy work. In addition to litigating sexual orientation and HIV/AIDS issues, including *Romer v. Evans*, 116 S.Ct.1620 (1996), Lambda frequently appears as *amicus curiae* in state and federal courts across the country. Lambda is deeply concerned by the issues raised in this case.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. It has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. The ACLU has been deeply involved in the interpretation and implementation of Title VII since its enactment, primarily through the work of the ACLU's Women's Rights Project. Through the work of its Lesbian and Gay Rights Project, the ACLU has fought for equal rights on behalf of gays and lesbians. This case thus raises issues of longstanding interest to the ACLU and its members.

Bay Area Lawyers for Individual Freedom (BALIF) is a minority bar association comprised of over 500 lesbian, gay and bisexual members of the Bay Area legal community. Founded in 1980, BALIF promotes the professional interests of its members and the legal interests of the gay, lesbian and bisexual community at large. As part of that mission, BALIF actively participates in public policy debates concerning the rights of lesbians, gay men and bisexuals. BALIF frequently

appears as *amicus curiae* in cases where it can provide perspective and argument that will inform a court's decision on a matter of broad public importance. BALIF believes that it is the nature of the harassing behavior, not the gender of the harassed or of the harasser, that should determine the applicability of Title VII. BALIF therefore opposes the Fifth Circuit's decision in *Oncale v. Sundowner Offshore Services*.

The Connecticut Women's Education and Legal Fund, Inc. (CWEALF) is a non-profit women's rights organization. Incorporated in 1973, CWEALF has over 1,400 members. The mission of the organization is to work through legal and public policy strategies and community education to end sex discrimination and to empower all women to be full and equal participants in society. CWEALF has a long history of working on both the issue of sexual harassment and the issue of gay and lesbian civil rights. We believe that sexual harassment is gender neutral and sexual-orientation neutral and that therefore same-sex sexual harassment should be actionable under Title VII.

Gay & Lesbian Advocates & Defenders (GLAD), New England's leading legal rights organization for lesbians, gay men, bisexuals and people with HIV, works in the courts and through public education to secure equal justice under law. Since its founding in 1978, GLAD has counseled people subjected to workplace discrimination, and has also appeared as counsel and *amicus curiae* in a wide variety of cases involving the scope of anti-discrimination protections and same-sex sexual harassment in the workplace. GLAD is interested in this case to demonstrate that existing sex discrimination prohibitions properly focus on the nature of the conduct involved, and must be interpreted to include a prohibition on same-sex sexual harassment, regardless of the sex or sexual orientation of the harasser or victim.

The National Center for Lesbian Rights (NCLR) is a national nonprofit civil rights organization founded in 1977 and headquartered in San Francisco. NCLR's principle objective is to secure and protect the civil rights of lesbian, gay, and bisexual people through litigation and public education. NCLR has a vital interest in securing fair and equal treatment in the workplace for all people, without regard to sexual orientation.

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, such as sexual harassment. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting sexual harassment, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D. Fla. 1991), *cross appeals dismissed per stipulation* (Mar. 14, 1995), and *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993). NOW LDEF also has filed *amicus* briefs in sexual harassment cases such as *Harris v. Forklift Systems Inc.*, 510 U.S. 17 (1993).

The National Women's Law Center ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has worked continuously to make Title VII's promise of equality in the workplace a reality. The Center has played a major role in shaping sexual harassment law, participating

as *amicus* in sexual harassment cases before the Supreme Court, including *Meritor Savings Bank v. Vinson*, *Harris v. Forklift Systems, Inc.*, and *Franklin v. Gwinnett County Pub. Sch.*, and as counsel and *amicus* in numerous sexual harassment cases in the lower courts. The existence of widespread sexual harassment in employment greatly restricts the opportunity for women to participate as full partners in the workplace. The Center has a deep and abiding interest in ensuring that Title VII adequately protects all workers from sexual harassment in employment.

The Northwest Women's Law Center (NWLC) is a Seattle-based public interest organization that works to advance the legal rights of women in the Northwest through litigation, education, legislation and the provision of legal information and referral services. Founded in 1978, the NWLC works to challenge all forms of sex discrimination including that faced by lesbians and gay men. It has long been the position of NWLC that sexual harassment and sex discrimination laws apply equally and without regard to an individual's sexual orientation. In that regard the NWLC has participated in a wide range of litigation and legislative advocacy challenging efforts to deny gay and lesbian employees the full protection of state and federal civil rights laws.

People for the American Way ("People For") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights, including efforts to protect the rights of women and of gay men and lesbians,

through such activities as supporting the enactment of civil rights legislation, participating in civil rights litigation, and conducting programs and studies directed at reducing problems of bias, injustice, and discrimination. People For seeks to participate in this case in order to help vindicate the important interests at stake, including the interest in the uniform application of Title VII to all employees, regardless of gender, and the interest of every employee in a workplace that is free from the type of egregious conduct that admittedly occurred in this case.

The Women's Legal Defense Fund (WLDF) is a non-profit national advocacy organization founded in 1971 to advance the rights of women in the areas of work and family. WLDF advocates for equal employment opportunity through litigation of sex discrimination cases, public education, and advocacy for improved enforcement of EEO laws.

(9)

Supreme Court, U.S.
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No. 96-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH ONCALE,

Petitioner,

vs.

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, and BRANDON JOHNSON,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF NATIONAL ORGANIZATION ON MALE SEXUAL VICTIMIZATION, INC.; MEN STOPPING RAPE, INC.; OAKLAND MEN'S PROJECT, INC.; MEN AGAINST PORNOGRAPHY; SEXUAL EXPLOITATION EDUCATION PROJECT, INC.; MEN OVERCOMING SEXUAL ASSAULT (a project of BAY AREA WOMEN AGAINST RAPE, INC.); STOP PRISONER RAPE, INC.; MEN OVERCOMING VIOLENCE, INC.; COMMUNITY UNITED AGAINST VIOLENCE, INC.; EMERGE: A MEN'S COUNSELING SERVICE ON DOMESTIC VIOLENCE, INC.; MEN STOPPING VIOLENCE, INC.; MEN'S RAPE PREVENTION PROJECT, INC.; NEW YORK CITY GAY & LESBIAN ANTI-VIOLENCE PROJECT, INC.; and NATIONAL COALITION AGAINST SEXUAL ASSAULT, INC., as Amici Curiae in Support of Petitioner

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court,[1] *Amici Curiae* herein file this brief in support of petitioner, Joseph Oncale.

Amici Curiae National Organization on Male Sexual Victimization, Men Stopping Rape, Oakland Men's Project, Men Against Pornography, Sexual Exploitation Education Project, Men Overcoming Sexual Assault (a project of Bay Area Women Against Rape), Stop Prisoner Rape, Men Overcoming Violence, Community United Against Violence, Emerge: A Men's Counseling Service on Domestic Violence, Men Stopping Violence, Men's Rape Prevention Project, New York City Gay & Lesbian Anti-Violence Project, and National Coalition Against Sexual Assault are organizations dedicated to ending sexual violence. Many provide professional services to male survivors of sexual abuse by other men. Some of the groups include men who have been sexually assaulted by other men. Most *amici* engage in community education and other expert activities, policy consultation, and activism. All share an interest in advancing principles of sex equality to redress and prevent sexual assault and related social patterns of sex-based subordination.

Amici recognize that when women and men are sexually violated, verbally or physically, they are targeted and harmed as women and as men. *Amici* are united in the view that same-sex sexual harassment, no less than opposite-sex sexual harassment, violates civil rights to sex equality under law. They believe that citizens should have a right to seek redress of such injuries.

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[1] Letters from both parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel made a monetary contribution to its preparation, production, and submission.

Through their experiences and work, *amici* have learned that sexual abuse of men by men is a serious and neglected social problem inextricably connected to sexual abuse of women by men. Male sexual aggression has widespread negative effects and deep roots in sex inequality in society. *Amici* believe that perpetrators of sexual harassment should derive no legal immunity from the gender of their victims. *Amici* thus share an interest in the legal recognition of Joseph Oncale's right to sue for sexual harassment by his male superiors as sex discrimination under Title VII.

Statements describing each amicus organization more specifically may be found at App. A.

STATEMENT OF FACTS

Joseph Oncale was employed from August to November of 1991 by Sundowner Offshore Services, Inc., as a roustabout on an oil rig in the sea for $7 an hour, seven days on, seven days off. E.E.O.C. Affidavit, Chg #270920368 (December 5, 1991) ("Aff."). It was a dangerous, isolated job in an all-male environment. Oncale Dep., Jan. 20, 1995 at 69. ("Dep.") As accepted on this motion, three men sexually harassed him there: John Lyons, his Sundowner supervisor, and Danny Pippen and Brandon Johnson, two Sundowner coworkers.

John Lyons began his sexual advances and sexual objectification of Oncale early in his employment. Dep. at 40:8-9 ("You know you got a cute little ass, boy"). Lyons said he was going to "fuck me in my behind." Aff. at 1. He threatened to rape him. Dep. at 41-42. ("'If I don't get you now, I'll get you later. I'm going to get you. You're going to give it to me'... [H]e said that I would have sex with him before it was over" at 42.) Such remarks were constant.

On October 25, 1991, Oncale was first sexually attacked physically. Aff. at 1. Pippen grabbed him, pulled him down, and held him immobile in a squatting position on his knees while Lyons unzipped his pants, pulled out his penis, and stuck it onto the back of Oncale's head. Dep. at 49-52. Oncale asked them to quit. Dep. at 53:2-3. Lyons and Pippen

laughed. Dep. at 53:8-9. Oncale later that day learned that most of his coworkers had seen the assault. Dep. at 53:2-3; Aff. at 2.

The next day, Brandon Johnson chose a dangerous moment on the job to grab Oncale and force him to the ground again. Dep. at 55. Lyons pulled his penis out and put it on Oncale's arm. Dep. at 57. Oncale complained to superiors. Aff. at 1.

That same night, Lyons and Pippen attempted to rape Oncale as he was taking a shower. Pippen grabbed him, lifting him off the ground by the knees, while "John Lyons grabs the bar of soap and rubbed it between the cheeks of my ass and tells me, you know, they're fixing to fuck me...." Dep. at 58. Oncale struggled and got away. Dep. at 60. He believed the intentions of Lyons were "to rape me" and those of Pippen were "to assist and/or help...rape me, too." Dep. at 72.

Oncale complained further and tried to arrange to get off the oil rig. The sexual advances and sexual threats continued. John Lyons said: "You told your daddy, huh? Well, it ain't going to do you no good because I'm going to fuck you anyway." Dep. at 74. Oncale "felt that if I didn't leave my job, that I would be raped or forced to have sex...that if I didn't get off the rig, that I would be sexually violated." Dep. at 73.

Oncale continued to try to work but "couldn't sleep because I was afraid that they would do something to me, I couldn't fight, and I felt disgraced." Aff. at 2. Oncale quit soon thereafter, stating on his pink slip that he "voluntarily left due to sexual harassment and verbal abuse." Aff. at Attachment 1. On December 5, 1991, he filed a complaint for sexual harassment with the E.E.O.C. His suit for sex discrimination under Title VII complained of both hostile environment and *quid pro quo* sexual harassment, *Complaint for Damages*, CA No. 94-1483 (E.D. La. 1994): "I felt that it was almost to a point where it was my livelihood." Dep. at 43.

In 1993, Oncale began experiencing severe panic attacks and other episodes of long-term post-traumatic stress. Dep. at 21. He became dizzy, numb in his hands, and had a rapid

heartbeat, which symptoms he continues to attempt to control and treat with medication and counseling. Dep. at 20-21.

SUMMARY OF ARGUMENT

Men raping men is a serious and neglected social problem with deep roots in gender inequality. Courts generally permit men who have been sexually assaulted and otherwise sexually harassed by other men at work to sue under Title VII of the Civil Rights Act of 1964, as women can. The Fifth Circuit decision under review is a pernicious legal anomaly, categorically precluding equality relief on summary disposition simply because the victim and victimizer are of the same sex. Its double standard of gender justice denies men rights because they are men—with negative implications for gay and lesbian rights as well, as exemplified by the related Fourth Circuit approach, under which heterosexual perpetrators may commit acts for which homosexual perpetrators are held legally responsible. These decisions make accountability for sex discrimination turn on who one is, not on what is done.

The better approach advanced by *amici*, building on the vast body of judicial precedent, is not abstract but concrete. Whether an assault is "because of sex," triggering Title VII, is a factual determination. Other legal requisites being met, if acts are sexual and hurt one sex, they are sex-based, regardless of the gender and sexual orientation of the parties.

The Fifth Circuit decision at bar is bottomed on misconceptions about the gendered nature of the sexual abuse of men, particularly its connections to the inequality of women to men and of gays and lesbians to heterosexuals. Male rape—whether the victim is male or female—is an act of male dominance, marking such acts as obviously gender-based and making access to sex equality rights for Joseph Oncale indisputable.

The Equal Protection Clause of the Fourteenth Amendment, as well as clear statutory principles, requires recognizing same-sex sexual assault as unquestionably actionable as sex discrimination under Title VII as a matter of law. The

decision of the Fifth Circuit in this case must accordingly be reversed.

ARGUMENT

INTRODUCTION

The Fifth Circuit stands alone in precluding Title VII access for same-sex sexual harassment. Every other circuit that has considered the question, whether in rulings, *Doe v. City of Belleville*, No. 95-3634, 1997 WL 400219, at *9 (7th Cir. July 17, 1997) ("*Doe*"); *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141 (4th Cir. 1996), *but cf. McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996); *Quick v. Donaldson Co. Inc.*, 90 F.3d 1372, 1379 (8th Cir. 1994), or in dicta, *e.g.*, *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring), *cert. denied*, 510 U.S. 1164 (1994); *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., with whom Scalia and Starr, JJ., join, dissenting from denial of rehearing *en banc*); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 n.4 (3d Cir. 1977), has found some allegations of harassment of men by men to state legally sufficient claims under Title VII's sex discrimination prohibition. *See also Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 49 (6th Cir.), *cert. denied*, 117 S. Ct. 170 (1996); *Purrington v. Univ. of Utah*, 996 F.2d 1025, 1028-31 (10th Cir. 1993); *Morgan v. Mass. Gen. Hosp.*, 901 F.2d 186, 192-193 (1st Cir. 1990).

The foundation of *Oncale* and fountainhead of its legal error is *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988). *Goluszek* held that while women sexually harassed by men have a Title VII remedy, because women are unequal to men at work, men sexually harassed by men have none, because an

all-male male-dominated environment cannot discriminate against a man as a man. Sexually victimized men are thus denied access to civil rights remedies when other men sexually violate or demean them at work in circumstances in which identically situated women have clear claims.

Repudiated in its own circuit by *Doe* at *9, and by every other Court of Appeals that has considered it, *Fredette*, 112 F.3d at 1509; *Hopkins v. Balto. Gas & Elec. Co.*, 77 F.3d 745, 751 (4th Cir.) (Niemeyer, J.), *cert. denied*, 117 S. Ct. 70 (1996), and by a number of district courts, *see, e.g.*, *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 704 (E.D. Wisc. 1996); *King v. M. R. Brown, Inc.*, 911 F. Supp. 161, 167 (E.D. Pa. 1995), the *Goluszek* opinion was nevertheless relied upon by the Fifth Circuit in its decision in *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994), to summarily rule that a man who was sexually attacked by a man on his job could not sue under Title VII. *Garcia*'s only other authority was an unpublished Fifth Circuit ruling, *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir.) (Table), *cert. denied*, 513 U.S. 925 (1994), which analyzed the issue in three sentences with no citations. *Giddens v. Shell Oil Co.*, No. 92-08533 (5th Cir. Dec. 6, 1993). (*See* App. B for full text.) *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 119-120 (5th Cir. 1996), *cert. granted*, 138 L.Ed. 2d 192 (1997), "in what can only be described as a lukewarm endorsement," *Caldwell v. KFC Corp.*, 958 F. Supp. 962, 968 n.3 (D.N.J. 1997), affirmed *Garcia* as precedent, leading to the present petition.

The many courts that have recognized the actionability of same-sex harassment claims before and since *Goluszek* have relied on the plain language of the statute, the clear weight of authority in sexual harassment cases, and deference to E.E.O.C. guidelines. They have used simple logic, equality principle, life experience, and common sense. The handful of courts that has refused to recognize the claim—principally district courts in circuits that have since allowed it, *see, e.g.*, *Benekritis v. Johnson*, 882 F. Supp. 521, 526 (D.S.C. 1995); *Torres v. Nat'l Precision Blanking*, 943 F. Supp. 952, 953 (N.D. Ill. 1996)—rely on *Goluszek*. *See Ton v. Information*

Resources, Inc., 70 F.E.P. Cases 355, 360 (N.D. Ill. 1996) (tracing impact and criticisms of *Goluszek*).

I. SEXUAL ABUSE OF MEN BY MEN IS A SERIOUS SOCIAL PROBLEM OF GENDER INEQUALITY.

Amici—as survivors of and experts on male-on-male sexual abuse—submit that *Goluszek*, hence the Fifth Circuit reliance on it, incorrectly analyzed the sexual abuse of men by men. Men *are* discriminated against based on their sex when sexually aggressed against by other men. They are targeted as men—usually as certain kinds of men—to be victimized through their masculinity, violated in their minds and bodies as individual members of their gender, as gender is socially defined.

A. Male Dominance in Society Includes Sexual Dominance of Some Men Over Other Men as Well as Over Women.

Anthony Goluszek's male coworkers verbally tormented him in sexually explicit ways, demeaned his adequacy as a man, accused him of being gay or bisexual based on his reticence to have or discuss an interest in "fucking" women, and poked his buttocks with a stick. *Goluszek*, 697 F. Supp. at 1454. Nonetheless the *Goluszek* court ruled that he was not discriminated against based on his sex because the purpose of Title VII is to redress "an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group[,]" namely women. *Id.* at 1456. Because Goluszek was "a male in a male-dominated environment," *id.*, he could not, the court found, have suffered an environment "that treated males as inferior[.]" *Id.* Conceding that Goluszek "may have been harassed 'because' he is a male," *id.*, the court nonetheless dismissed his claims because the acts complained of could not have created "an anti-male environment" for him at work. *Id.*

Goluszek's workplace was unmistakably a male-dominated environment. This Court has observed that they exist. *See,*

e.g., Kahn v. Shevin, 416 U.S. 351, 353 (1974) (noting "the socialization process of a male-dominated culture" as source of women's poverty); *Dothard v. Rawlinson*, 433 U.S. 321, 334-335 (1977) (women excluded from contact jobs in male-only prisons due to atmosphere of violence against men). Sex segregation combined with gender hierarchy in the workforce ensures that many, perhaps most workplaces are dominated by men, in numbers or power or both. *See generally* THE GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995). Sex integration addresses the sex-discriminatory composition of all-male environments, *see, e.g., United States v. Virginia*, 116 S. Ct. 2264 (1996), but the sex-discriminatory norms long endemic to such settings—under which men may sexually victimize others—must also be addressed to make sex equality real.

Amici strongly agree with the *Goluszek* court that Title VII—certainly as amended and interpreted over time—is aimed at rectifying sex-based power imbalances and stopping male abuses of power in the workplace. But men abuse male power over other men as well as over women. To conclude, from the fact that women are differentially sexually abused at work, that men who are sexually abused are not abused as men, and should have no Title VII relief, reflects not only faulty analysis but false assumptions, misreadings,[2] and incomplete information.

The *Goluszek* opinion displays several common myths about male-on-male sexual abuse with which *amici* are familiar in their work: that men, acting as members of their gender, cannot and do not dominate other men as well as

[2] The note cited in *Goluszek* attributes the "disproportionate exposure of women to heterosexual sexual harassment" to the "historically inferior position of women in a male-dominated work force" to justify its own valid focus on sexual harassment of men by women. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1467 n.1 (1984). The note does not say or imply that male-on-male sexual harassment is not actionable.

women; that when a man sexually abuses another man, the actions are not sexual and not gender-based; and that male domination of some men over other men is not part of the social system whereby men dominate women.

In the world of *Goluszek*, men in all-male environments do not oppress other men in sex-specific ways. As one district court, in following *Goluszek*, put it: "This theory focuses on whether there is an atmosphere of oppression by a 'dominant gender,' and thus assumes that the harasser and victim must be of opposing genders." *Martin v. Norfolk S. Ry.*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996). Masculinity is assumed to be uniform, gender making all men sufficiently equal to one another that no man can be in a significant position of powerlessness relative to another man. But as study after study has shown, all-male environments are frequently characterized by extreme hierarchy well-documented to breed sexual abuse of men by men, whether from "a sense of macho competition, violence as a rite of passage, an expression of dominant status, or an initiation of hazing." MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 35 (1997) ("*Scarce*") (14 studies reviewed at 11-34).

Men are most often raped by other men when there are no women around: in prisons, in confined and isolated work sites, in men's schools and colleges, in the military, in athletics, in fraternities. Michael B. King, *Male Rape in Institutional Settings*, in MALE VICTIMS OF SEXUAL ASSAULT 67 (Gillian C. Mezey & Michael B. King eds., 1992). Men sexually abuse those they have power over in society: first, women and children; then other men, typically on the basis of their status as men of a particular age, Dep. at 4:6 (age 21); physical stature, Dep. at 59:25 (weight of "125, 135"); ethnicity, *Goluszek*, 697 F. Supp. at 1453 (Polish); race, *Scarce*, at 18 (African-American men disproportionately victimized); disability, *McWilliams* 72 F.3d at 1193 (learning disability), *Ward v. Ridley Sch. Dist.*, 940 F. Supp. 810, 811 (E.D. Pa. 1996) (mentally retarded); or sexual orientation, perceived, *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *7 (6th Cir.

Jan. 15, 1992), or actual, *Nabozny v. Podlesny*, 92 F.3d 446, 451 (7th Cir. 1996), that makes them attractive for, or vulnerable to, male sexual aggression.

The *Goluszek* court held that a man cannot be made inferior as a man in an all-male setting. But both Goluszek and Oncale were treated as inferior men in very standard ways—Oncale more violently. Oncale's attackers were asserting male dominance through imposing sex on a man with less power. Men who are sexually assaulted are thereby stripped of their social status as men. They are feminized: made to serve the function and play the role customarily assigned to women as men's social inferiors. In terms that apply to male-on-male rape generally, Susan Brownmiller analyzes prison rape of men as "an acting out of power roles within an all-male, authoritarian environment in which the weaker, younger inmate...is forced to play the role that in the outside world is assigned to women." SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 258 (1975). This lowers the victim's status, making him inferior as a man by social standards. For a man to be sexually attacked, by placing him in a woman's role, demeans his masculinity; he loses it, so to speak. This cannot be done to a woman. What he loses, he loses through gender, as a man. *See generally* Jim Struve, *Dancing With the Patriarchy: The Politics of Sexual Abuse*, in THE SEXUALLY ABUSED MALE 3 (Mic Hunter, ed., 1990).

Often it is men perceived not to conform to stereotyped gender roles who are the targets of male sexual aggression. Goluszek was taunted for appearing unwilling to oppress women sexually. Because he did not conform to his male coworkers' view of what his gender behavior ought to be, because he was not seen to be practicing sexual objectification and subordination of women, he was seen as less a man according to their sex-stereotyped standards. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (sex stereotyping actionable as sex discrimination). *See generally* JOHN STOLTENBERG, REFUSING TO BE A MAN 41-56 (1989). Goluszek was punished, ostracized, insulted, and forced to consume pornography to make him conform to their

stereotype of how a man should be a man by subordinating women sexually. He was subjected to homophobic slurs reflecting the common assumption that if he is not "fucking" a woman, he is no longer a man as male supremacy defines it. "Having his gender questioned," *Doe* at *4, marked Goluszek's abuse as sex-based. Title VII's goal of "strik[ing] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (part quoted with approval in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986)), clearly intercepts such acts.

The reading of Title VII by *Goluszek* and its progeny did nothing for women except use their powerlessness to justify doing nothing for relatively powerless men. The errors in *Oncale* predicated upon it should not be followed by this Court.

B. Denial of Sex and Gender in Male-on-Male Sexual Abuse Maintains Male Dominance.

The gravamen of *Goluszek* is that male same-sex aggression is not gendered in the sense Title VII requires. Implicit is an insistence that men cannot be sexually dominated in their social status or roles *as men*. The denial that interactions among men can have a sexual component, and that sexual abuse of men is gendered, are twin features of the social ideology of male dominance with which *amici* are familiar as experts. In this ideology, men are seen as sexually invulnerable. This image protects men from much male sexual violence and naturalizes the sexual abuse of women, making it seem that women, biologically, are sexual victims. Denying that men can be sexually abused as men thus supports the gender hierarchy of men over women in society. The illusion is preserved that men are sexually inviolable, hence naturally superior, as the sexual abuse of men by men is kept invisible. *See* Fred Pelka, *Raped: A Male Survivor Breaks His Silence*, ON THE ISSUES, Spring 1992, at 8.

Accordingly, some courts jump to de-sexualize and de-gender male-on-male sexual aggression. In denying access to

equality relief, they call the behavior at issue "horseplay," *McWilliams*, 72 F.3d at 1194; "mere locker room antics," *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1501 (E.D. Va. 1996) (allowing same-sex suit); being "razzed," *Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994), *rev'd*, 887 F. Supp. 1178 (N.D. Ind. 1995); and "a personal grudge match," *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1410 (E.D. Wisc. 1996). They pass it off as "puerile and repulsive," *McWilliams*, 72 F.3d at 1196; "diffuse" and "ambiguous," *Hopkins*, 77 F.3d at 753; "offensive and tasteless," *id.* at 755; obsessive, insecure, vulgar, insensitive, and mean, *McWilliams*, 72 F.3d at 1196; "crude and offensive," *Mayo v. Kiwest Corporation*, 898 F. Supp. 335, 337 (E.D. Va. 1995); "physically violent and sadistic...malevolence and spite," *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285, 287 n.4, 676 N.E. 2d 45, 47 n.4 (Mass. 1997) (from lower court decision); "cretinous," *Callanan v. Runyun*, 75 F.3d 1293, 1298 n.5 (8th Cir. 1996), and "trash talk," *Blueford v. Prunty*, 108 F.3d 251, 254 (9th Cir. 1997). The point is to call the behavior anything but sexual and attribute it to anything but gender. Amazingly, even gender is used to deny gender, for example, "boys will be boys"—a gendered description if ever there was one—being considered *not* gender-based. *Seamons v. Snow*, 84 F.3d 1226, 1240, 1241 (10th Cir. 1996). That the behavior described may be everything these courts say it is does not mean that it is not sexual and gendered, hence sex-based.

Denial that sexual abuse of men by men is sexual in nature is a common feature of male dominance. When a man's testicles are aggressively grabbed, it takes a lot to deny that the attack has something to do with the fact he is a man, but the district court managed it in *Quick v. Donaldson Co., Inc.* 895 F. Supp. 1288 (S.D. Ia. 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996). Attacks focused on male sexual organs are sexual attacks, hence sexual. With the Seventh Circuit, "frankly, we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender." *Doe* at *15. Similarly, when men rub another man's penis until it becomes erect, blindfold him and

force him to his knees and put their fingers into his mouth in simulated fellatio, expose their genitals to him, put a broom handle between his buttocks, ask him for sex, offer to pay him money for sex, unzip their fly and invite him into a restroom stall, flick their tongue and say "I love you" while sex is discussed, *see McWilliams*, 72 F.3d at 1198-99 (Michael, J., dissenting) (facts), powerful denial is required to deem the conduct anything but sexual. But, in *McWilliams*, because the perpetrators "were" heterosexual, the Fourth Circuit imagined this aggression to be

> "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focussed speech or conduct. Perhaps "because of" the perpetrators' own sexual perversion, or obsession, or insecurity. Certainly, "because of" their vulgarity and insensitivity and meanness of spirit. But not specifically "because of the victim's *sex*.

Id. at 1196 (italics in original). None of the conjectured motivations excludes gender as the driving force in all of them. Moreover, motivation need not be exclusively gender-based to be actionably gender-based. *Price Waterhouse*, 490 U.S. at 241 (under Title VII mix of gender and other motives is "because of sex") (plurality). *See also* Civil Rights Act of 1991, §107(a), 42 U.S.C. §2000e-2(m) 105 Stat. 1074-1076 (1994).

Moral disapprobation is no substitute for equality analysis and legal accountability. The acts against Mr. McWilliams were neither gender-neutral nor indiscriminate; they asserted male dominance. He was targeted as a man, a certain kind of man the court described as having "arrested ... cognitive and emotional development." 72 F.3d at 1193. "Men's rape of women is a hateful act designed to reinforce male supremacy. So is men's rape of men." Rus Ervin Funk, *Men Who Are Raped*, in *Scarce*, at 222. He was abused as women are so often abused—except that women, when their sexuality hence

their gender is assailed by men at work, have a Title VII remedy.

II. SEXUAL HARASSMENT OF MEN BY MEN IS SEX-BASED ABUSE UNDER SEX EQUALITY GUARANTEES AS A MATTER OF LAW.

A. Sex Discrimination Law, Hence Sexual Harassment Law, Protects Both Sexes.

Sexual harassment is legally recognized as a form of sex-based discrimination. There is no question that both Title VII and the Equal Protection Clause of the Fourteenth Amendment, under which sexual harassment is also actionable, *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986); *Pontarelli v. Stone*, 930 F.2d 104, 113-14 (1st Cir. 1991), protect both sexes equally, even if, due to gender inequality in society, these provisions, as applied, do not always affect the sexes in precisely the same way.

The plain language of Title VII protects all individuals from sex discrimination: "It shall be an unlawful employment practice for an employer...to discriminate against any individual with respect to his...terms, conditions, or privileges of employment, because of such individual's...sex...." 42 U.S.C. §2000e-2(a)(1) 78 Stat. 255 (1994). In deciding that this prohibition on discrimination "because of such individual's sex" applied to men, this Court stated: "Male as well as female employees are protected against discrimination." *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 682 (1983).

Other than in the *Goluszek* line of cases, sexual harassment law has uniformly followed the same rule for over twenty years, prohibiting unequal sexual predation at work regardless of the gender of the parties. *See Tomkins*, 568 F.2d at 1047 n.4; *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (quoted with approval in *Meritor*, 477 U.S. at 66-67.) As the Ninth Circuit put this principle: "*all* individuals—male or female—belong to a 'protected' group for purposes of

determining discrimination on the basis of their sex." *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994) (emphasis in original). Just as men unquestionably can bring Title VII claims when sexually harassed by women, *Huebschen v. Dep't of Health and Soc. Servs.*, 716 F.2d 1167, 1172 (7th Cir. 1983), and women when sexually harassed by men, nothing except *Goluszek* and the Fifth Circuit says that men cannot bring the same claims women can bring, including claims against men.

No one has legal *carte blanche* to discriminate against members of their own racial or gender group. *See Walker v. IRS*, 713 F. Supp. 403 (N.D. Ga. 1989). Nor does any basic principle of equality law or the Supreme Court's recognition of the claim for a sexually hostile working environment restrict the relief available to survivors based on the gender of discriminator or victim. *King v. Town of Hanover*, 959 F. Supp. 62, 66 (D.N.H. 1996), *aff'd. on other grounds*, 116 F.3d 965 (1st Cir. 1997). As noted by the Eleventh Circuit in ruling that same-sex harassment is actionable under Title VII, "There is simply no suggestion in these statutory terms that the cause of action is limited to opposite gender contexts." *Fredette*, 112 F.3d at 1505. *Accord Caldwell*, 958 F.Supp. at 968.

Title VII and the protections of the Constitution's Equal Protection Clause, as interpreted, form a single body of equality law on this point. Not only is the standard of review for women and men the same, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 & n.8 (1982), but this Court's basic sex equality doctrine has been largely built in cases of men seeking sex equality rights, *see, e.g., Orr v. Orr*, 440 U.S. 268 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), to choose only a few.

Equality rights, while based on group membership, are personal rights. *Shelley v. Kramer*, 334 U.S. 1, 22 (1948). "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals[.]" *J.E.B. v. Alabama*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (males excluded from jury service

because of gender violates equal protection); *see also Connecticut v. Teal*, 457 U.S. 440, 455-56 (1982). While the Constitution, like Title VII, is rightly concerned for members of groups who have traditionally been subjected to systematic discrimination, it has never confined individual access to equality relief to members of such groups. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Individual men may need equality rights particularly when, as here, their situation is exceptional among men and/or they are in situations in which women, as members of the subordinated gender group, are more typically found. *See, e.g., Weinberger, supra* (widower father caring for newborn baby at home); *Hogan, supra* (man seeking admission to nursing school).

B. Same-Sex Harassment Is Facially Sex-Based When It Is Sexual and One Sex Is Victimized.

To be actionable as sex discrimination, an impugned behavior must be "because of sex." When a man sexually harasses another man, how do we know it was "because of sex"?

Drawing on over twenty years of judicial development of the legal claim for sexual harassment, the answer is the same for men as for women, for gay men and lesbian women as for heterosexual women and men. It is a question of fact. For purposes of motions testing the legal sufficiency of sexual harassment claims, sexual allegations are facially gender-based. When, in addition, one sex is disadvantaged, sex-based discrimination is unambiguously claimed as a matter of law.

1. Whether Alleged Acts Are "Based on Sex" Is a Question of Fact.

The first two appellate cases to establish the legal claim for sexual harassment, *Barnes, supra* (*quid pro quo*), and *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (hostile environment), took the view that whether or not behavior was sex-based under Title VII was a question of fact. To overcome motions to dismiss arguing that sexual harassment of a woman by a man was not sex-based as a matter of law

because the same thing could have been done to a man, the D.C. Circuit thought that what mattered was not what could have been done but what *was* done.

Thus, in *Barnes*, the D.C. Circuit held: "But for her womanhood, *from aught that appears*, her participation in sexual activity would never have been solicited...." *Barnes*, 561 F.2d at 990 (emphasis added). Sticking to facts circumvented the sophistic argument that because sexual harassment could be done to either or both sexes, it was not sex-based when done to one. To the *Barnes* court, the plaintiff's allegations were sex-based due to "the fact that [defendant] imposed upon her...a condition which ostensibly he would not have fastened upon a male employee." *Barnes*, 561 F.2d at 989 n.49. "Ostensibly" meaning, on the facts alleged. As the *Barnes* court further clarified, "Appellant flatly claims that but for her gender she would not have been importuned, *and nothing to the contrary has as yet appeared*, and there is no suggestion that appellant's allegedly amorous supervisor is other than heterosexual. *These are matters for proof at trial....*" *Id.* (emphasis added). In *Bundy*, the D.C. Circuit glossed this formulation, considering same-sex as well as opposite-sex harassment: "in each instance the question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender?" *Bundy*, 641 F.2d at 942 n.7. In other words, the conceptual possibility of bisexual or homosexual harassment was not allowed to preclude a trial on the facts of heterosexual harassment, in this case, of a woman by a man.

Later courts followed the "but for sex" test in case after case of male-on-female harassment. *See, e.g., Jones v. Flagship Int'l.*, 793 F.2d 714, 719 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990); *Stewart v. Weis Markets, Inc.*, 890 F. Supp. 382, 390 (M.D. Pa. 1995). The widely followed opinion in *Henson* formulated it: "In the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion. It will therefore be a simple matter for the

plaintiff to prove that but for her sex, she would not have been subjected to sexual harassment." *Henson*, 682 F.2d at 904 (citing *Bundy*, 641 F.2d at 942 n.7). Why "obvious"? Do courts assume that if behavior is heterosexual, it is gendered? They may. But there was no allegation to the contrary. Nothing else appearing, courts infer that the behavior is gender-based as heterosexuality is gender-based.

Denials of facial challenges in the same-sex harassment context have taken the same approach: factual. *Wehrle v. Office Depot, Inc.*, 954 F. Supp. 234, 236 (W.D. Okla. 1996) (male-on-male, gender basis is issue of fact for trial); *Gerd v. United Parcel Serv., Inc.*, 934 F. Supp. 357, 361 (D. Colo. 1996) (male-on-male, motive and causation "tend to be fact specific and should not be resolved under Fed.R.Civ.P. 12").

Some judges believe that opposite-sex harassment cases make knowing that the behavior is sex-based relatively easy, while same-sex cases make it comparatively hard. *Hopkins*, 77 F.3d at 753-54 ("ambiguously sexual innuendos" at 754). *Amici* disagree. The facts are no more likely to be clear or murky in same-sex than in opposite-sex cases. The view that opposite-sex settings are easily gendered while same-sex settings are not reflects a presumption of heterosexuality. Correctly understood, the same tests developed to determine whether harassment is gender-based in cases between women and men—is it sexual? is one sex harmed?—apply equally in cases between women and between men.

2. Aggression That Is Sexual Has Been Treated by Courts as Facially Sex-Based.

Sexuality is gendered in societies of sex inequality. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 126-131 (1989); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 182-183 (1979). As a result, for better or worse, in most instances "[i]t is the essence of sexual conduct between two individuals that the one initiating or inviting the conduct normally does so because of the other's sex." *Tietgen*, 921 F. Supp. at 1500-01.

Courts adjudicating sexual harassment claims reflect this state of affairs when they unproblematically consider that *sexual* allegations are gender-based allegations. "Sexual harassment is *ordinarily* based on sex. What else could it be based on?" *Nichols*, 42 F.3d at 511 (emphasis in original). *See also Michael M. v. Super. Ct. of Sonoma County*, 450 U.S. 464 (1981) (statutory rape law on "intercourse" treated as facially sex-based).

Without requiring genital proof, courts routinely deem opposite-sex harassment "unquestionably based on gender," *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 806 n.2 (5th Cir. 1996), simply because the facts alleged are sexual facts. Thus, for example, from facts of "sex-based opprobrium," "statements implying that her sexual charms had something to do with sales," and "constant lectures pertaining to her sex life," the conclusion is drawn than an environment is sex biased. *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982). The Third Circuit observed, "[T]he intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexually derogatory language is implicit, and thus should be recognized as a matter of course." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990).[3] Sexuality is so obviously gendered that courts have sometimes felt the need to stress that sexuality isn't *all* there is to Title VII's gender-harassment prohibition. *See, e.g., Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010, 1014 (8th Cir. 1988). Courts have properly rejected out of hand the argument that sexual initiatives by a man to a woman were not gender-based because "his actions were merely the result of his desire for King as an individual and, therefore, were not sex-based harassment." *King v. Bd. of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533, 538 (7th Cir. 1990). Persons are sexually gendered as individuals.

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[3] That sexual allegations are facially gender-based would be a good reason that no separate proof of intent or motive going to "basis in sex" has generally been required in sexual harassment cases.

The view "if it's sexual, it's gendered" has also guided same-sex cases. In one male-on-male case, "[t]he earnest sexual solicitation alleged...provides a firm basis for the inference that [plaintiff] was harassed because of his gender." *Tietgen*, 921 F. Supp. at 1502. In another, statements referring to male-on-male fellatio and gestures indicating sex with a penis meant that "the very nature of the conduct alleged raises the inference that Hamill directed his behavior at the plaintiff because he was male." *King*, 959 F. Supp. at 66.

The underlying question of whether impugned treatment is or is not sexual is itself a question of fact—subtle at times, often anything but. Sexually speaking, two men saying "we're going to fuck you" and one pulling out his penis, Dep. at 58:23-24, 57, is hardly subtle. Behavior can be hostile, produce anguish or distress (and intend to), *King*, 898 F.2d at 539-40, or aim to demean, *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 471-72, 482 (5th Cir. 1989), and still be sexual. Producing fear in another, or abusing power, *see Horn v. Duke Homes*, 755 F.2d 599, 601-603 (7th Cir. 1985) (defendant used supervisory power to fulfill his sexual desires), can be sexually arousing or potentiating to the perpetrator. *See generally E.E.O.C. v. Farmer Brothers Co.*, 31 F.3d 891, 897-98 (9th Cir. 1994) (discussing motives).

But the genders of the perpetrator and the victim do not dispose of whether a given behavior is sexual or not. One cannot presume that behavior that is sexual in opposite-sex contexts is not sexual in same-sex contexts, as Judge Neimeyer does in *Hopkins*, 77 F.3d at 752-53. Just as acts do not automatically become sexual simply because they are engaged in by members of different sexes, acts do not become nonsexual simply because they are engaged in by members of the same sex. No differential presumptions are appropriate.

3. Harassment Is Sex-Discriminatory When Sexual and One Sex Is Victimized.

Concurring in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), a case of male-on-female sexual harassment, Justice Ginsburg clarified that, in proving discrimination based on

sex as required in *Meritor*, 477 U.S. at 66, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring) (citation omitted). The E.E.O.C.'s directive on same-sex harassment uses precisely these terms: "The victim does not have to be of the opposite sex of the harasser. Since sexual harassment is a form of sexual discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex." 2 EEOC Compliance Manual §615.2(b)(3) (1974 & Supp. 1996). Same-sex harassment courts have applied this "singles out one sex" rule with no difficulty. *See, e.g., Raney v. Dist. of Columbia*, 892 F. Supp. 283, 287-88 (D.D.C. 1995); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1137 (C.D. Ill. 1995). Counting heads across the gender line may not capture every sex-based disparity, but only one sex is harmed in every federally reported sexual harassment case to date.

Although not a question raised by this appeal, even when both sexes are victimized by sexual harassment, sex discrimination can result, some dicta to the contrary notwithstanding. The so-called bisexual harasser, eluding equality snares by indiscriminately sexually harassing men and women alike,[4] stalks the judicial imagination, cutting quite a figure in legal hypotheticals.[5] But in more than twenty years, an actual

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[4] It should not be assumed that gender plays no role in bisexuals' choice of sexual partners.

[5] The *Barnes* court distinguished the heterosexual and same-sex harasser from the bisexual superior, for whom "the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike." *Barnes*, 561 F.2d at 990 n.55. *Accord, Bundy*, 641 F.2d at 942 n.7 (same). Several subsequent courts have made similar statements, none on facts before them. *Henson*, 682 F.2d at 904; *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting), *aff'd*,

(Footnote continued)

equal-opportunity harasser has yet to be sighted in federal court.[6] It is settled law in sexual harassment cases that (1) plaintiff must allege one sex is harmed to state a legally sufficient *prima facie* case; (2) defendant must plead and prove the defense that both sexes are harmed, not raise it as a defect in law pre-trial; and (3) to prevail, the harm must be proven to be actually equal. Nothing in the same-sex context disturbs these resolutions.

Meritor, *supra*; and *Ryczek v. Guest Services, Inc.*, 877 F. Supp. 754, 762 (D.D.C. 1995).

[6] While equal discrimination is a clear oxymoron, *see Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 541 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996), this Court's constitutional sex equality jurisprudence recognizes that both sexes can be discriminated against based on sex at the same time from a single practice. *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980). Yet to *amici*'s knowledge, the federal courts have never yet found it to be in a sexual harassment context. *Steiner*, *supra*, came closest, but the Ninth Circuit saw through it, observing that "while [defendant's] abuse of men in no way related to their gender, his abuse of female employees...centered on the fact that they were females." *Steiner*, 25 F.3d at 1464. So did the Eighth Circuit in finding that "a fact-finder could conclude that Albaghdadi's treatment of women is worse than his treatment of men[,]" so the claim was gender-based. *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993). Chief Judge Posner disavowed the practical effect in dicta: "It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, although his preferred targets were female." *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996). *See Waltman*, 875 F.2d at 477 n.3 (rejecting "equal offensiveness" defense on facts); *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989) (same); *Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037, 1043 (7th Cir. 1994). *See also King*, 911 F. Supp. 161 (E.D. Pa. 1995) (woman's claim against company for sexual harassment by both woman and man found sex-based).

C. Neither the Rights of Victims Nor the Liabilities of Perpetrators of Sexual Harassment Should Turn on Their Sexual Orientation.

The sexual orientation of the parties inevitably arises in,[7] and is implicated in ruling on, same-sex harassment. The sexual orientation of the parties is, however, properly irrelevant to the legal sufficiency of sexual harassment claims. An accused perpetrator's being gay or lesbian does not make that person's behavior sex-based, but sexual orientation may be pertinent in determining whether particular behavior is based on sex, *see Doe* at *20-*21, in the totality of the circumstances.

1. Access to Sex Equality Relief for Acts of Sexual Abuse Depends on the Acts, Not on the Sexual Preference of the Actors.

Wright v. Methodist Youth Services, 511 F. Supp. 307 (N.D. Ill. 1981), the first reported case of same-sex sexual harassment, held that a man fired because he rejected the sexual advances of his male supervisor stated a claim for sex discrimination under Title VII. *Wright* described the behavior as "homosexual advances," *id.* at 308, 309, although so far as is known, most men who sexually abuse other men are heterosexual. *Scarce* at 17 (summarizing results of 14 empirical studies at 15). The *Wright* ruling thus established that same-sex sexual advances were sex-based within the meaning of Title VII in a context that linked that result to the sexual preference of the perpetrator.

The emerging rule is to regard sexual orientation as not determinative of the legal sufficiency of same-sex claims as a

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[7] "I feel that they made homosexual advances toward me. I feel they are homosexuals." Dep. at 41:23-24. The Fifth Circuit described the threats to Oncale as "threats of homosexual rape" but did not address sexual orientation, *Oncale*, 63 F.3d at 118, nor do the certified questions in this case state an issue of homosexuality as such.

matter of law but to admit it as relevant on the facts. Perpetrator sexual orientation does not make unwanted sexual initiatives sex-based any more than victim sexual orientation makes unwanted advances welcome, although both can be relevant (if sometimes only minimally) to both factual determinations. *See Yeary*, 107 F.3d at 447-48. It is not categorically irrelevant because "[w]hen a homosexual supervisor is making offensive sexual advances to a subordinate of the same sex, and not doing so to employees of the opposite sex, it absolutely is a situation where, but for the subordinate's sex, he would not be subjected to that treatment." *E.E.O.C. v. Walden Book Co., Inc.*, 885 F. Supp. 1100, 1103-1104 (M.D. Tenn. 1995); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 355 (D. Nev. 1996) (sexual preference of the harasser irrelevant to summary determination). *See also Vandeventer*, 887 F. Supp. at 1180. Although care must be taken that this approach does not create an opening for homophobic attacks, the rule itself merely applies the same standard to everyone.

Sexual orientation on its face disposes of nothing. Gay men do not initiate unwanted sex to all men any more than lesbian women welcome sexual attention from all women. Needless to say, from knowing a person is gay, one cannot deduce that they sexually harassed another person. But the fact that a perpetrator of same-sex harassment is not gay—or not known to be gay or proveably gay—also does not render same-sex sexual behavior *not* sex-based. Thus the Fourth Circuit's view that same-sex sexual harassment by heterosexual men cannot be sex-based, *McWilliams*, 90 F.3d at 1194-1195, but harassment by homosexual men can be, *Wrightson*, 99 F.3d at 143, is wrong on many grounds. Those boys who were just boys in the machine shop in *McWilliams* became sexual and gendered when they ran the restaurant in *Wrightson*? Beyond misreading social reality, the Fourth Circuit approach is impractical (courts are now to adjudicate a person's "real" sexual orientation?), incoherent (a victim's recovery for sexual abuse depends on what the perpetrator does with voluntary others?), and invidious (heterosexuals may sexually abuse people whom homosexuals may not?). On the Fourth Circuit's view,

if a plaintiff could prove that one of the "baggers" in *Quick* actually "is" gay, would his testicle-grabbing become sex-based, while the identical act of the straight coworker next to him is not?

By definition, sexual harassment is unwanted, so victim sexual orientation is as irrelevant on same-sex facial challenges on sex-basis as it is on opposite-sex ones. The sexual orientation of the victim cannot convert aggression that is sex-based into aggression that is not, or vice-versa.

Will Title VII access now turn on the sexual feelings and imagined or real sexual identities of perpetrators? Will it have one sexual harassment rule for gay sexual harassers and another for straight ones? one for those whose sexual feelings have coalesced, another for those whose sexual feelings are diverse, diffuse, denied, deniable, unknown, or simply unproveable? Oncale sued for forced sex. Why should the gender of those with whom Lyons and Pippen are sexual, when others want to be sexual with them, determine Oncale's rights against them for violating (what is conventionally considered) his manhood?

2. Harassment Because of Homosexuality Is Harassment Because of Sex.

In practical terms, harassment because of homosexuality cannot be separated from harassment because of sex. The gender of sexual object choice (although not all there is to sexual orientation) partly defines gender in society. The gender of a person with whom one has sex, or is thought to have sex, is a powerful constituent of whether one is considered a woman or a man in society. *See generally* JUDITH LORBER, PARADOXES OF GENDER 55-79 (1994).

The pitfalls of trying to separate the two are illustrated by *Dillon*. Mr. Dillon was taunted, ostracized, and physically beaten by coworkers because they believed he was gay. They called him "fag" and other terms of homophobic abuse, he said, because he was a man. The Sixth Circuit, admitting his harassment was "clearly sexual in nature," *Dillon*, 1992 WL

5436 at *6, rejected his Title VII claim, saying it was because of homosexuality not sex. So far as is discernible in the opinion, Mr. Dillon is heterosexual. In the view of *amici*, he was harassed as a male. Women are not called "fag." When women are seen as effeminate, they are rewarded, or sexually harassed in ways clearly marked as sex-specific. Dillon should not have had to prove facts that did not exist, such as that "his coworkers *would have* treated a similarly situated woman...differently," or to argue that "a lesbian *would have* been accepted." *Id.* at *9. Hypothetical counterfactuals cannot be proven. That the behavior was sexual, and that no women *were*, in fact, subjected to it (supported in Dillon's case by evidence of clearly homophobic attacks) should be enough.

Only men are subject to denigration by gay-bashing taunts like "faggot." Only women are subject to denigration by the use of terms like "dyke" as epithet and insult. Such abuse is inherently socially gendered. Using sex with members of one's own sex as derision, insult, and hostility denigrates the target's gender-adequacy. Such terms, when part of sexual harassment, create a hostile environment for men *as men* and for women *as women*, whether directed at straights or gays. Because they attack individuals as members of their gender group, they are based on sex.

Separating sexuality from gender, hence harassment due to gender from harassment due to sexual orientation, is impractical and would lead to anomalous results, as *Valadez v. Uncle Julio's of Ill., Inc.*, 895 F. Supp. 1008 (N.D. Ill. 1995), illustrates. The male defendant had "crudely discussed his desire to engage in sexual activities with [lesbian] plaintiff and other female employees, both lesbian and non-lesbian." *Valadez*, 895 F. Supp. at 1014. He made advances "to plaintiff...because she was a woman as well as a lesbian." *Id.* He made such comments to other women, lesbians and nonlesbians, and no men. The court found this conduct gender-based. It did not find defendant's advances to straight women actionable as sex-based and those to lesbian women not actionable as based on sexual orientation. As the *Valadez* court perceptively noted, "defendant argues that because [he] was aroused

by the fact that plaintiff is a lesbian his subsequent conduct is not actionable. Whether plaintiff would have enjoyed having sex with [him] is not the issue." *Id.* The advances were doubly gender-based: because she is a woman, and because she is a woman who loves women. Disallowing such claims will, as a practical matter, leave lesbian women often without recourse.

Although this appeal does not require resolution of the question, *amici* submit that sexual harassment because of sexual orientation is sex-based discrimination. When individuals are sexually harassed because of the sex of their sexual partners, real or imagined, they are harassed because of sex. First, formally speaking, those harassed because they are gay men or lesbian women are harassed because of the *gender* of their sexual partners and identification. If their own gender, or that of their loved ones, were different, they would not be so treated. They are precisely similarly situated to heterosexuals in having sexual relationships *based on gender* yet are treated differently because of their own gender, the gender of their sexual partners, or both. *See Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (Sup. Ct. Haw. 1994) (prohibition on same-sex marriage prohibited sex classification under Hawaii Constitution); *Engel v. Worthington*, 23 Cal. Rptr. 2d 329 (Ct. App. Cal. 1994) (unpublished). *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 153-158 (1996). Second, more substantively, gay men and lesbian women, through challenging the naturalness and inevitability of gendered-unequal roles in sex, challenge the sexual dimension of gender inequality under which sexual violence by men against women, and some men, is widespread. BUREAU OF JUSTICE STATISTICS 1994 NATIONAL CRIME VICTIMIZATION SURVEY, BUREAU OF JUSTICE STATISTICS BULLETIN 4 (1996) (5% of rapes reported to survey of victims age 12 and over are of men).

Third, usually *both* gay men and lesbian women are not sexually harassed by the same harasser. Equal oppression—discrimination seen as based not on gender but on sexual orientation, hence not covered, *DeSantis v. Pac. Tel. & Tel. Co. Inc.*, 608 F.2d 327 (9th Cir. 1979), however misguidedly—

may occur in this context scarcely more often than bisexual harassment appears to. In any case, sex equality rights are individual rights. It is no answer to victimization based on the supposed gender-inappropriateness of one's sexuality that others of another sex who make the corresponding "error" are also discriminated against. Equal discrimination in this sense is sex discrimination two times over, not no discrimination at all.

III. THE EQUAL PROTECTION CLAUSE FORBIDS EXEMPTING SAME-SEX HARASSMENT CLAIMS FROM TITLE VII COVERAGE.

The Fifth Circuit's approach in *Oncale* creates a blatant double standard in sexual harassment cases based on gender, and potentially on sexual orientation as well, that denies survivors equal protection of the laws. Men are denied legal protection women have. Under the Fourth Circuit's extension, straight perpetrators can freely commit sexual aggression for which gay perpetrators are held accountable. And because sexual harassment due to sexual orientation, wrongly, is regarded as not covered by Title VII, *DeSantis*, 608 F.2d at 329-30; *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084-85 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985), some courts have concluded that "Title VII does not protect homosexuals from harassment...since such treatment arises from their affectional preference rather than their sex." *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 139 n.2 (S.D. Tex. 1993).

A dual system of rights on an arbitrary ground violates every equal protection standard known. The Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (*quoted with approval, Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996). Surely, if officially ignoring men's complaints of sexual harassment while taking women's seriously violates the sex equality component of the Equal Protection Clause, *Nabozny*, 92 F.3d at 456 (school must "give male and female

students equivalent levels of protection"); and of Title VII, *Madon v. Laconia School District*, 952 F. Supp. 44, 47-48 (D.N.H. 1996) (school ignoring complaint of anal groping of teacher by principal is sex-based); and of Title IX, *Yusef v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994), judicially interpreting Title VII to ignore men's complaints of sexual abuse by men, while allowing women's complaints of sexual abuse by men, does as well. And this Court taught in *Romer* that homosexuals, as such, may not be excluded from the ordinary civil processes for asserting their rights that are available to everyone else.

Without question, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to [another] person[.] *Bakke*, 438 U.S. at 289-290 (Powell, J., with whom White, J., joined). But the parallel between this case and the "reverse discrimination" cases—advanced by the Eleventh Circuit in *Fredette*, 112 F.3d at 1509, and adopted in *Storey v. Chase Bankcard Services*, 1997 WL 414730, at *6 (D. Ariz., July 21, 1997)—is more formal than substantive. Those who claim "reverse discrimination" say they are treated the way the historically powerless are treated. However, affirmative action designed to redress and end arbitrary social exclusion and white/male supremacy, *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971), *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), does not violate the legal equality rights of individual members of socially dominant groups who thereby lose their customary group-based privileges. *But cf. Hopwood v. Univ. of Tex.*, 84 F.3d 720 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). At the same time, it would be perverse to allow members of dominant groups to use equality laws to reassert their dominance while denying access to equality relief to individual members of dominant groups who *fail* to meet their group's standard for dominance and/or *are* treated like members of historically powerless groups are so often treated.

Oncale presents a real, not imagined, a direct, not reverse, act of discrimination based on sex. It cannot be the case that

whites, wrongly claiming racism, can destroy equality programs for people of color while sexually assaulted men, rightly claiming sexism, cannot sue their victimizers. And far from undermining the rights of those who most often need the claim, allowing Oncale to sue under Title VII not only takes nothing from them but, by reducing the stigma of sexual assault and increasing accountability for it, benefits all sexual abuse survivors.

Much sexual harassment jurisprudence reasons that, had a sexually harassed woman been a man, she would not have been so treated, therefore she is harassed "because of sex." The present case poses the question, What if she had been a man and the same thing happened? The answer is at once sex-specific and sex-neutral: both sexes are covered for injuries through their gender. Women do not have sex equality rights only because men couldn't be treated in the same way, this case suggests, but because men could be and are not. And when they are? Had he been a woman, Mr. Oncale might not have been treated the way he was. But if he were, his sex equality rights would be recognized.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be reversed and the cause remanded for trial on the merits.

Respectfully submitted,

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APPENDIX A

Appendix A

DESCRIPTIONS OF *AMICI CURIAE*

NATIONAL ORGANIZATION ON MALE SEXUAL VICTIMIZATION, INC. (NOMSV), founded in 1988 and incorporated in 1995, is a nonprofit membership organization of diverse individuals, committed through research, education, advocacy, and activism to the prevention, treatment, and elimination of all forms of sexual victimization of boys and men. The organization, which has members from throughout the United States and Canada, includes both male survivors of sexual abuse and professionals who work with this issue.

NOMSV believes that sexual harassment, homophobia, and male privilege to engage in violent/aggressive behaviors are all norms that contribute to a social context that breeds sexual abuse. In particular, NOMSV believes, same-sex sexual harassment without effective legal recourse creates a norm that perpetuates the victimization of males.

NOMSV has an interest in the outcome of the *Oncale* case because it involves the sexual victimization of a male, because NOMSV is intent on stopping such abusive incidents from occurring, and because NOMSV is committed to changing social norms that contribute to such incidents. These goals would be served, NOMSV believes, by permitting Joseph Oncale to sue his perpetrators under Title VII.

MEN STOPPING RAPE, INC. (MSR), founded in 1983 in Madison, Wisconsin, is a community-based group of men seeking ways to end masculine violence. MSR provides information and speakers, facilitates workshops, and distributes educational materials. MSR's message to men is that the sexual assault of females *and* males, and an entire continuum of attitudes and behaviors supporting it, are critical issues for men to address. MSR is committed to educating men because it believes that only as young males learn to expect safety for themselves can they be expected to respect the same rights for other men and for women.

In MSR's discussions of male socialization, many boys and men, beginning to realize the underlying connection of sexual assault to power, have identified their own experiences of having been assaulted, mostly by other males. Through MSR's rape-prevention education work in all-male environments such as prep schools, fraternities, sports teams, juvenile and adult prisons, and military academies, MSR has found that there are many male survivors of incest or other sexual abuse. Some fraternity initiations are sexual assaults, and sexual assault is used as "punishment" in athletic teams and the military. MSR believes that sexual assault of females will not end until the sexual assault of males is also addressed. Clearly defining sexual violence by men against men (and by women against women) as a practice of sex-based discrimination, as *Oncale* seeks to do, would promote this goal.

OAKLAND MEN'S PROJECT, INC. (OMP), was started in Oakland, California, in 1979 as a community education program to stop men's violence. OMP is a nationally recognized program dedicated to helping people understand the roots of violence, and to building alliances across lines of gender, race, sexual orientation, and age. As a multicultural men's nonprofit agency, it conducts community organizing and violence-prevention education and training for schools and state and national institutions and organizations. Publications include *Making the Peace* (Hunter House, 1997), a violence-prevention curriculum for young people, now being conducted as a program at urban and rural sites throughout California and across the United States.

OMP is interested in the outcome of the *Oncale* case because of OMP's commitment to intervene in and prevent men's violence, in particular physical and sexual violence against women and against other men. OMP understands this violence to be connected to male socialization—the training of boys and young men to "act like a man." The clearest effect of this socialization is the re-creation, generation by generation, of gender inequality and harassment, discrimination, domination, and other forms of violence among men. As a multicultural men's organization, we have conducted

violence-prevention trainings for nearly 20 years, currently reaching 5,000 youth and adults per year; we know from our trainings, and from our own lives, the profound effects of socialization and resultant forms of sexual and physical harassment. The *Oncale* case offers a chance for legal recourse for male victims of sexual abuse from other men, while pointing out the common sources of the sexual harassment of both women *and* men by men.

MEN AGAINST PORNOGRAPHY (MAP), a nonprofit organization located in New York City and founded in 19[illegible], develops and distributes educational materials and workshops for men about how pornography negatively affects their attitudes and behavior as men. MAP encourages men to become involved in helping to create sex equality. MAP recognizes that male-against-male violence and male-against-female violence are closely related phenomena—both in survivors' experience of subordination and aggressors' gendered motivation to dominate. In the *Oncale* case, MAP seeks to further the legal recognition that violence of men against men, like violence of men against women, is a product of a social system of gender hierarchy in which men dominate others who are less powerful.

SEXUAL EXPLOITATION EDUCATION PROJECT, INC. (SEEP), is a nonprofit organization in Portland, Oregon, whose primary purpose is to provide community education about sexual exploitation and, specifically, men's accountability in stopping it.

Sexual harassment, like other kinds of sexual exploitation, is predominately a form of men's violence against women. It is discrimination based on sex and it is about the societal power men have over women. Men sexually harass women in order to prove their manhood to themselves and their peers. This type of male sexual identity is based on dominance; the gender of the recipient of the abuse doesn't change that. *Oncale v. Sundowner* brings to our attention as a nation the reality that men sexually subordinate other men as well as women. Many times, in fact, SEEP has found that the all-male peer group is a training ground for men. It's where males learn, by assaultive and

sexualized humiliations of each other, how to treat women in a world where to not be a real man is to be less than nobody.

SEEP provides educational presentations to over 4,000 middle and high school students each year in the Portland area concerning sexual harassment, date rape, dating violence, and prostitution/pornography. From experience doing this violence-prevention work with young people, SEEP sees again and again how men's sexual subordination of men is fundamentally connected to men's sexual subordination of women. It is SEEP's position that the law should protect all recipients of sexual harassment, regardless of gender. If it does not, if we tacitly condone male-on-male sexual harassment by not affording men the equal protection of the law, we will never be able to eliminate men's violence against each other and subsequently against women.

MEN OVERCOMING SEXUAL ASSAULT (MOSA) is a project of BAY AREA WOMEN AGAINST RAPE, INC. (BAWAR). The nation's first rape-crisis center (incorporated in 1971), BAWAR is a private, nonprofit organization whose mission is to empower, support, intervene on behalf of, and advocate for sexual assault survivors and their significant others.

Current statistics show that one in ten men will be sexually assaulted as adults. For many survivors, isolation and shame make seeking help difficult; for male survivors this withdrawal may be heightened by the perception that rape-crisis counseling is available only for women and by the misperception that only gay or bisexual men are assaulted. BAWAR began the MOSA project to provide male survivors of sexual assault with a supportive context for dealing with the issues they face, regardless of sexual orientation. As part of BAWAR's commitment, through MOSA, to assist survivors of male-on-male assault, BAWAR has an interest in the legal recognition of male-on-male sexual harassment as a civil-rights violation.

STOP PRISONER RAPE, INC. (SPR), is a national nonprofit organization dedicated to combating the rape of male and female prisoners and to helping survivors of jailhouse rape.

It is estimated that 80,000 unwanted sexual acts take place behind bars in the United States every day, with a total of 364,000 prisoners raped every year. Most male victims are young, small, nonviolent, unable to defend themselves against ruthless exploitation. Full of rage and lacking psychological treatment for Rape Trauma Syndrome, they typically return to the community far more violent and antisocial than before they were raped, and some become rapists themselves in a misguided attempt to "regain their manhood."

The purposes of SPR are to provide education, information, and advocacy at all levels with regard to this ongoing nightmare of sexual assault and enslavement; to provide encouragement, advice, counseling, and legal support to survivors; to train the staff who must deal with them; and to combat this systematic and cyclic horror in every way possible.

SPR is interested in the *Oncale* case because SPR is opposed to male-on-male sexual assault no matter where it takes place.

MEN OVERCOMING VIOLENCE, INC. (MOVE), a nonprofit organization in San Francisco, California, works to end male relationship violence, challenges attitudes and beliefs that perpetuate that violence, and promotes a cooperative, nonabusive model of masculinity. To accomplish this, MOVE provides counseling for adult and adolescent batterers, reeducation, professional training, community education, and advocacy for change in public policy.

Since 1980, MOVE has called on Bay Area men to take responsibility for, and to cease, their violent behavior. The main principle governing MOVE's work is that most men's abusive behavior is learned, and is not the result of inherent traits or psychological disorders.

Through its work, MOVE has come to understand men's relationship violence as involving destructive patterns of power, domination, and control. In joining the *Oncale* case, MOVE seeks to further the recognition and elimination of pernicious societal patterns that reward male power and control over others who are perceived as less powerful.

COMMUNITY UNITED AGAINST VIOLENCE, INC. (CUAV), is a community-based organization dedicated to creating an environment free of violence and oppression for the lesbian, gay, bisexual, and transgender communities of San Francisco. Toward that end, CUAV develops programs and services to empower and protect these communities' dignity, identity, and individual rights and to promote their safety and self-determination.

Founded in 1979, CUAV offers a range of programs for survivors of hate and domestic violence, including a crisis line; counseling; referrals; advocacy in the justice, medical, and mental-health systems and with other service providers. CUAV also provides extensive educational programs and trainings on homophobia, violence, personal safety awareness, and self-defense.

CUAV understands violence to be a manifestation of hatred, bigotry, ignorance, and fear. As part of its educational and outreach work, CUAV collects, analyzes, and disseminates statistics and other information about homophobic hate violence and same-sex partner violence in order to advocate to effect positive legal protection and civil rights. It also provides legal services to survivors of hate crimes, harassment, and domestic violence.

CUAV joins this *amicus* brief in support of Joseph Oncale out of the long-standing conviction underlying its activities that hateful aggression against individuals on account of their sex or sexual orientation cannot be excused or exonerated on any ground and that justice and empowerment require that survivors have access to civil amelioration against perpetrators without regard to the sex or sexual orientation of either person.

EMERGE: A MEN'S COUNSELING SERVICE ON DOMESTIC VIOLENCE, INC., founded in 1977 in Boston, is the nation's first counseling program for men who batter and the largest such program in New England. Emerge is committed to helping men to confront and take responsibility for their abusive behavior. Emerge has learned from many experts on domestic violence and sexual assault that the psychological and

economic impact of such treatment is usually devastating and long-lasting, regardless of the gender of the victims.

Recognizing that the usual targets of abusive behavior are women, Emerge believes that neither gender should be subjected to physical assault, sexual and verbal degradation, and terroristic behavior such as occurred in the *Oncale v. Sundowner* case. Such egregious behavior in a work setting is no less terrifying and humiliating to men than it is to women. These injuries can be prevented, Emerge believes, only if companies are held accountable for tolerating gender-based violence and harassment against their employees.

MEN STOPPING VIOLENCE, INC. (MSV), founded in 1982 in Atlanta, Georgia, is a nonprofit organization dedicated to ending violence against women. Its focus is to stop battering, and its intention is to work toward ending rape and incest.

As MSV works to help men change their abusive behavior, MSV recognizes that individual change is dependent upon changing social systems that support the private and institutional oppression of women. MSV believes that groups of men can work together to change patriarchal values and belief systems that oppress women and children and dehumanize men themselves. In this struggle, MSV looks to, and supports the work of, the battered-women's movement. Believing that all forms of oppression reinforce one another, MSV also seeks to confront power hierarchies that are based on race, class, or sexual orientation.

MSV believes that men's violence against women has its roots in men's contempt for women, which is both learned and expressed through verbal insults—such as "sissy," "pussy," "mama's boy," "henpecked," "throws like a girl"—by which men classify other men as women, hence sexual or gender inferiors. The work to end men's violence against women is strengthened by acknowledging the connection between men's contempt for women and men's assaults on men—a connection that allowing Joseph Oncale to sue for sexual harassment would clearly promote.

MEN'S RAPE PREVENTION PROJECT, INC. (MRPP), a nonprofit educational organization in Washington, D.C., works to prevent rape and other forms of male violence through community education, consulting, research, and public action. MRPP supports men by providing them with the resources and opportunities to challenge themselves and others to end sexual violence. MRPP urges men to recognize their collective capacity to prevent sexual violence in order to join with women in building a rape-free society.

MRPP recognizes that there are complex relationships between sexist violence and other often violent forms of oppression, such as racism and homophobia. By confronting these institutions—and by supporting legal means of holding men accountable for their sexual violence against other men as well as against women, as the *Oncale* case would do—MRPP believes men will make a dramatic statement about their commitment to living peacefully in a world based on equality and free choice rather than privilege and coercion.

NEW YORK CITY GAY & LESBIAN ANTI-VIOLENCE PROJECT, INC. (AVP), a crime-victim-assistance agency founded in 1980, is the only organization in New York that specifically serves lesbian, gay, bisexual, and transgender survivors of sexual assault, domestic violence, hate crimes, and other forms of criminal victimization. In addition to documenting these crimes, AVP provides a twenty-four-hour crisis-intervention hotline; peer and group counseling; accompaniment to and advocacy with police, the courts, and other service providers; information and referrals. AVP serves the larger community by working to change public attitudes that tolerate, insulate, or instigate hate-motivated crime, and to reform government policies and practices affecting lesbian, gay, and other survivors of crime.

AVP recognizes that rape and sexual assault can happen to anyone, including men, regardless of their race, class, age, size, appearance, or sexual orientation. AVP considers sexual assault to occur any time either a stranger or someone known touches any parts of a person's body in a sexual way, directly or through clothing, when that person does not want it. And

AVP considers rape to be any kind of sexual assault that involves the forced penetration of the anus or mouth, even partially, by a penis or other object. AVP believes that rape and sexual assault, like any other forms of violence, are used to exert power and control over another person and should be legally actionable by victims asserting their civil rights.

NATIONAL COALITION AGAINST SEXUAL ASSAULT, INC. (NCASA), is a nonprofit membership organization founded in 1978. NCASA's members include over 500 rape-crisis centers, sexual-assault-prevention programs, women's centers, individuals, and allied organizations. In recent years workshops at conferences have included topics on serving male survivors and the involvement of men in the anti-sexual-violence movement.

NCASA is a feminist organization that provides leadership to the movement to end sexual violence through advocacy, education, and public policy. NCASA's vision is to eliminate sexual assault and all forms of oppression. NCASA works to attain qualified services for victims/survivors and challenges the nation to commit to a rape-free culture.

NCASA holds an annual conference that addresses treatment, research, awareness, and program development. It publishes *NCASA News*, fact sheets, and public-policy updates. The information it circulates is based on survivor reports, expert literature, and NCASA oversight of the legal system. NCASA provides current, accurate, and comprehensive information to victim-service providers, public-policy makers, media, members, and the public.

NCASA's work to end sexual violence includes all forms of sexual violence, including against women, children, and men. Therefore, NCASA has a high interest in ensuring that legal prohibitions against sexual violence and sexual harassment apply to all victims/survivors, regardless of their gender or other characteristics.

APPENDIX B

Appendix B

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-8533

RICHARD A. GIDDENS, ET AL.,

Plaintiffs,

RICHARD A. GIDDENS,

Plaintiff-Appellant,
Cross-Appellee,

versus

SHELL OIL COMPANY,

Defendant-Appellee,
Cross-Appellant,

and

JACK TUCCI,

Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Texas

(M-91-CV-98)

Before REAVLEY, DAVIS, Circuit Judges, and TRIMBLE,[1] District Judge.

PER CURIAM:[2]

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[1] District Judge of the Western District of Louisiana, sitting by designation.

[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and

(Footnote continued)

Our review of the record and the relevant law in this case persuades us that the district court correctly entered a take-nothing judgment against plaintiff, Richard Giddens.

Giddens failed to state a claim for relief under Title VII. Harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination. Giddens did not allege how his employer treated him differently because he was a male and he produced no evidence at trial tending to prove such facts. The district court, therefore, correctly dismissed Giddens' Title VII action.

Giddens' action for negligent infliction of emotional distress and negligent hiring and supervision are barred by the Texas Workers' Compensation Act.

Giddens' claim for intentional infliction of emotional distress against Shell is precluded by the jury's finding that Tucci's acts were not committed in the course and scope of his employment.

We need not consider Giddens' claim for intentional infliction of emotional distress against Tucci, because Giddens has not complained about the district court's dismissal of his action against Tucci.

For these reasons, we affirm the judgment of the district court.

AFFIRMED.

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burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

No. 96-568 (11)

Supreme Court, U.S.
FILED
AUG 11 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TO BE REPRINTED

JOSEPH ONCALE,

Petitioner,

—v.—

SUNDOWNER OFFSHORE SERVICES, INC. ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Amici are law professors who teach employment law, discrimination law, women, gender, or race and the law. Because federal courts across the country have disposed of Title VII same-sex sexual harassment claims in inconsistent ways, and because we have studied the history and fundamental principles that underlie sexual harassment doctrine specifically, and discrimination laws generally, we provide the Court with our understanding of the issues raised in this case.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court. A complete list of *amici* is set forth in Appendix A.[1]

SUMMARY OF THE ARGUMENT

The court of appeals erred in holding that Title VII "does not recognize male-on-male [sexual harassment] claims." *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118, 120 (5th Cir. 1996). Such a blanket rule barring same-sex sexual harassment claims under Title VII finds no support in either the text of Title VII, or in the jurisprudential history of sexual harassment doctrine.

Amici urge the Court to reverse the Fifth Circuit Court of Appeals' determination that Title VII bars all same-sex sexual harassment claims, and remand the case for further fact-finding with respect to the circumstances under which Mr. Oncale alleges he was

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[1] This brief was authored by the *amici* and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No one other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

sexually harassed. Such an inquiry is necessary in cases of this kind to determine whether the harassment amounted to discrimination because of sex. The inferences that can be reasonably drawn in traditional sexual harassment cases - to wit, that the conduct is a form of sex discrimination prohibited by Title VII - cannot be so easily drawn from the conduct in same-sex sexual harassment cases. Nevertheless, though a more extensive inquiry may be called for, many same-sex harassment cases fit easily within Title VII's definition of sex discrimination. Among the types of evidence that the trial court may find probative on this point are whether Mr. Oncale was singled out for harassment because he did not conform to traditional norms of masculinity, and/or whether he suffered continued offensive sexual conduct because he objected to the hyper-masculine environment that characterizes many all-male workplaces.

ARGUMENT

As the discussion that follows amply demonstrates, sexual harassment has been understood by the courts to be a form of sex stereotyping that offends Title VII. *Amici* will briefly set out the history of sexual harassment doctrine and the theories under which unwelcome conduct of a sexual nature in the workplace has come to be understood as a form of sex discrimination. This discussion will make clear that the sexual equality principles at stake in different-sex sexual harassment cases may be present in same-sex sexual harassment as well, making same-sex sexual harassment cases actionable under Title VII. *See generally,* Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN.L.REV. 691 (1997). In our view, the Fifth Circuit's ruling fails to appreciate why sexual harassment of any kind is a form of sex discrimination by ignoring the ways in which sex stereotyping can manifest itself in the workplace.

Neither the text of Title VII of the Civil Rights Act of 1964,

42 U.S.C. 2000e *et seq.*, nor well-established sexual harassment doctrine supports the Fifth Circuit's blanket rule barring sexual harassment claims between persons of the same sex. The principles at work in traditional sexual harassment cases - where a man is charged with sexually harassing a woman - can apply with equal force where victim and harasser are of the same sex. This Court reiterated in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), that when an employer acts on the basis of sex stereotyping, the employer has acted on the basis of gender in violation of Title VII. Sexual harassment is a form of sex stereotyping. *See, e.g., Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 861 n. 15 (3d Cir. 1990). Not in *Price Waterhouse, Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 7 (1986), *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), nor in any other decision construing the meaning of "discrimination because of sex" has this Court required that the party acting on the basis of sex stereotyping be of a different sex from the victim thereof.

I. FOR OVER TWO DECADES, SEXUAL HARASSMENT LAW HAS PROHIBITED CONDUCT THAT REINFORCES SEX STEREOTYPES IN THE WORKPLACE

The concept of sexual harassment as a kind of sex discrimination is now well-established. After a period of unsuccessful litigation in which sexual harassment claims were dismissed under a "boys will be boys" view of the harm, in the late 1970s and early 1980s courts began to recognize that unwelcome sexual conduct in the workplace should be understood as a form of discrimination because of sex.

Early sexual harassment litigation produced a series of defeats for plaintiffs who sought to challenge sexually harassing work environments under Title VII. In *Corne v. Bausch and Lomb,*

Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded without reported decision*, 562 F.2d 55 (9th Cir. 1977), one of the first sexual harassment cases litigated under Title VII, two female clerical workers alleged that onerous verbal and physical sexual harassment by their immediate male supervisor amounted to discrimination on the basis of sex. The court recognized that Title VII extended beyond discriminatory hiring or firing to the terms and conditions of employment once hired, but nevertheless rejected the plaintiffs' harassment theory. In prior cases, the court observed, the discriminatory acts had been undertaken pursuant to company policy, or in pursuit of some relative corporate advantage derived from the discriminatory practices. *Id.* at 163. The sexually harassing conduct of which Corne complained, however, was different:

> In the present case, [harasser's] conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, [harasser] was satisfying a personal urge. Certainly no employer policy is here involved. . . . [A]n outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.

Id. at 163-64. The court's reasoning in *Corne* is representative of the treatment sexual harassment claims received generally during this period.[2] On this view, sexual content or coercion in workplace

[2] *See e.g., Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977) (court dismissed female employee's charge that she had been discriminated against because

relationships is merely the inevitable result of a sexually heterogeneous workplace -- it is the price women pay for participating equally in the wage-labor market.

On one level, the early sexual harassment cases were about determining employer responsibility under Title VII in light of pre-existing agency principles. On a deeper level, however, the cases legitimized a view of workplace sexual harassment that regards the plaintiffs' claims as private "gripes" rather than discriminatory "grievances," and regards the defendants' conduct as horseplay or locker room antics - normal and healthy manifestations of male sexuality that have simply gotten out of hand. This mistaken view of the scope and meaning of Title VII generally, and sexual harassment specifically, was short lived as courts came to appreciate the discriminatory nature of sexual harassment.

Rather than conceptualize sexual harassment as an independent wrong of sexual misconduct, in the late 1970s advocates for women's rights argued that the conduct was a species of sex discrimination, because "only the sex discrimination laws provide a coherent examination of sexually harassing conduct as a legal wrong." Sarah E. Burns, *Issues in Workplace Sexual Harassment Law and Related Social Science Research*, J. SOC. ISSUES, Spring 1995, at 193 (citation omitted). Advocates reframed the problem of

her boss asked her to lunch, then became drunk, made sexual advances toward her, and threatened retaliation when she tried to leave the restaurant. "[N]atural sexual attraction can be subtle. If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time."); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976)("It is conceivable, under plaintiff's theory, that flirtations of the smallest order would give rise to liability. The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions."), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979).

sexual harassment as a problem of sex-based power. In SEXUAL HARASSMENT OF WORKING WOMEN (1979), Catharine MacKinnon argued that sexual harassment is sex discrimination because it causes arbitrary differentiation between men and women in the workplace, such that "men are not placed in comparable positions to women when they are comparably circumstanced." *Id.* at 216. In short, "[s]exual harassment limits women in a way men are not limited. It deprives them of opportunities that are available to male employees without sexual conditions." *Id.* at 193.

To show that sexual harassment was sex discrimination, feminist advocates began with the relatively small body of Title VII sex and race discrimination cases decided in the mid to late 1970s. The case for finding *quid pro quo* harassment a violation of Title VII was the easiest to make. In 1977, the D.C. Circuit first recognized that the conditioning of employment-related economic benefits on sexual favors was sex discrimination. In *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), the plaintiff alleged that her job had been eliminated by her male supervisor because she refused his sexual advances; advances that would not have been tendered had Barnes been a man. *Id.* at 985. The Court of Appeals held that

> [b]ut for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel.

Id. at 990 (footnotes omitted).

Courts were slower, however, to recognize the hostile environment theory of sexual harassment. Again, looking to existing

sex and race discrimination jurisprudence, advocates argued that sexual harassment should be prohibited under Title VII. Title VII's antidiscrimination prohibitions applied not only to actions of an economic nature, such as hiring, firing, or promotions, but also to the noneconomic "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (1994). Early "terms and conditions" cases established, on a case by case basis, that Title VII prohibited a range of practices that granted women lesser workplace privileges than men.[3] Ultimately, these practices were found to violate Title VII because Congress intended that the law "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978), *quoting, Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).[4]

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[3] *See, e.g., Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 194 n.3 (6th Cir. 1978) (giving female physical education teachers inferior locker and shower facilities); *Trivett v. Tri-State Container Corp.*, 7 Fair Empl. Prac. Cas. (BNA) 1292, 1296 (E.D. Tenn. 1973) (requiring female employees to remain at their posts while allowing male employees to line up and clock out first); *Laffey v. Northwest Airlines, Inc.*, 6 Fair Empl. Prac. Cas. (BNA) 902, 910-912 (D.D.C. 1973) (imposing height and weight requirements for female but not male employees, forbidding female but not male employees from wearing eyeglasses, and imposing a no-marriage rule on female but not male employees); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338, 339-40 (D. Or. 1969) (requiring mandatory rest periods for female workers only, thereby eliminating females from consideration for certain positions); EEOC Dec. No. 71-109, 1973 EEOC Dec.(CCH) ¶ 6165, at 4277-78 (July 29, 1970)(affording men, but not women, the right to smoke while they worked); EEOC Dec. No. 70-503; 1973 EEOC Dec. (CCH) ¶ 6114, at 4207-08 (Feb. 4, 1970) (paying death benefits to surviving spouses of male employees, but not female employees); *Nabisco Settles Restroom-Break Suit.* 1996 Daily Lab. Rpt. (BNA) 77 (April 22, 1996) (discussing *Hernandez v. Nabisco, Co.*, No. CV 153713 (Cal. Sup. Ct. Apr. 17, 1996)) (women allowed to use the restroom only during breaks, whereas men allowed to do so anytime they wanted).

[4] This language was again cited approvingly by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. at 228, and *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *see also* Nadine Taub, *Keeping Women in Their Place:*

Having established that Title VII did not necessarily require a showing of wage-based injury, courts soon recognized that harassing conduct could alter the work environment in a discriminatory manner just as surely as policies that provided men and women with different amenities or imposed different sex-based rules.

Courts first recognized that harassment could constitute a discriminatory term or condition of employment in national origin and race cases. In *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), the plaintiff challenged the offensive work environment created by her employer, an optometrist who operated his practice in a discriminatory manner by

> "segregating" his Hispanic and Anglo patients. The Fifth Circuit held that the phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. . . .

Id. at 238. The *Rogers* conception of national origin based discriminatory workplace "pollution" was later extended to

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Stereotyping Per Se *as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 349 (1980) (charging that "stereotypical role expectations" have hampered the effectiveness of Title VII in combating workplace discrimination directed against women, and arguing that they be recognized as "discrimination *per se*").

workplace harassment based upon race,[5] and religion.[6]

In time, courts further interpreted Title VII to prohibit sex-based harassment. Note that *sex-based* harassment is not the same thing as *sexual* harassment.[7] Sex-based harassment occurs when a person is harassed in the workplace because of her or his sex through the use of nonsexual conduct. Examples of nonsexual, sex-based conduct include indicating that women shouldn't perform certain kinds of work, *Lipsett v. University of P.R.*, 864 F.2d 881, 906 (1st Cir. 1988) (comments that women should not be surgeons), that a "woman's place [is] in the bedroom or the kitchen," *Fox v. Southeast Transp., Inc.*, Civ. Action Nos. 89-1442-WF, 89-1449-WF, 1993 WL

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[5] *See e.g., Swint v. Pullman-Standard*, 539 F.2d 77, 89-90 (5th Cir. 1976) (discriminatory job assignments, even absent salary discrimination or economic harm); *Steadman v. Hundley*, 421 F. Supp. 53, 57 (N.D. Ill. 1976) (supervisor's racial slurs and unfairly adverse recommendations may lead to Title VII violation); *Murry v. American Standard, Inc.*, 373 F. Supp. 716, 717 (E.D. La. 1973)(black employee called "boy"), *aff'd*, 488 F.2d 529 (5th Cir. 1973); EEOC Dec. No. 72-1561, 4 Fair Empl. Prac. Cas. (BNA) 852, 852 (May 12, 1972) (racially derogatory graffiti); EEOC Dec. No. 72-0957, 4 Fair Empl. Prac. Cas. (BNA) 837, 837-38 (Feb. 2, 1972) (racial joke using "nigger" in training program); EEOC Dec. No. 72-0779, 4 Fair Empl. Prac. Cas. (BNA) 317, 317-18 (Dec. 30, 1971) (black employee called "nigger"); EEOC Dec. No. 71-720, 3 Fair Empl. Prac. Cas. (BNA) 142, 142 (Dec. 17, 1970) (black employee called "little black Sambo").

[6] *See, e.g., Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) (supervisor's demeaning religious slurs); *Rattner v. Trans World Airlines*, City of New York Commission on Human Rights, Decision No. 4135-J, September 11, 1973 (antisemitic graffiti).

[7] *See Harassment on the Basis of Sex and Related Conduct Not Constituting Sexual Harassment*, E.E.O.C. Comp. Man. (CCH) § 615.6, ¶ 3105, at 3217 (Jan. 1982) ("Sexual harassment is one type of harassment based on sex. However, it is not the only type of unlawful harassment which is sex-based or which stems from sex discrimination. For proper processing and investigation of harassment charges, it is important to correctly distinguish sexual harassment from other forms of sex-based harassment and related conduct.").

543203, at *2 (D. Mass. Dec. 9, 1993), *aff'd*, 25 F.3d 1037 (1st Cir. 1994), that hiring women was undesirable because they would quit and get married, *Parton v. GTE North, Inc.*, 802 F. Supp. 241, 245-46 (W.D. Mo. 1991), *aff'd*, 971 F.2d 150 (8th Cir. 1992), or that they were taking jobs from men with families, *Fox*, 1993 WL 543203, at *2. These early sex-based harassment cases, like the race-based harassment cases, took one of two principal forms: the harassment either conveyed the harasser's subjective discriminatory mental state (*e.g.*, women should stay home and have babies or are not fit for certain types of work), or took a form that could have been motivated by a number of reasons, including sexist attitudes (*e.g.*, denying female workers adequate breaks.) *See* EEOC Dec. No. 71-2046, 1973 EEOC Dec. (CCH) ¶ 6242, at 4428 (May 12, 1971) (female employees as a class placed in shifts that did not qualify for breaks).

In the first kind of case, the discriminatory nature of the harassment was transparent from the substance of the harassing conduct--it bespoke sex stereotyping. These cases factually echoed early race-based harassment cases in which African Americans were harassed for being "uppity"[8] or "trouble-makers."[9] In both contexts,

[8] *See, e.g.*, *Robertson v. Granite Sch. Dist.*, No. 90-4164, 1992 WL 2883, at *2 (10th Cir. Jan 7, 1992) (African-American male school coach terminated in part because he was "an uppity nigger"); *Williams v. Cerberonics*, 871 F.2d 452, 456 (4th Cir. 1989) (terminated African-American woman referred to as that "black uppity female"); *Marable v. H. Walker & Assoc.*, 644 F.2d 390, 396 (5th Cir. 1981)(finding that a landlord refused to rent to African-American man because, inter alia, he was "uppity"); EEOC Dec. No. 70-198, 1973 EEOC Dec. (CCH) ¶ 6087, at 4133 (Oct. 9, 1969) (black employee discharged because his self-confident manner caused resentment among white employees).

[9] *See, e.g.*, *Daugherty v. City of Danville*, No. 87-5850, 1988 WL 90892, at *4 (6th Cir. Sept. 1, 1988) (former African-American police officer alleged chief of police said he wanted to weed out "nigger troublemakers"); *Thomas v. Daniel Parker*, CIV.A. No. 76-1852, 1979 WL 149, at *7 (D.D.C. Feb. 8, 1979) (black Foreign Service officer denied tenure because he was "greatly concerned with

the harassment was undertaken because women and/or people of color had violated gender and race stereotypes. In the second kind of case, however, further evidence was necessary to prove that the harassing conduct was undertaken "because of the target's sex." This additional evidence put the harassment in a context that revealed its discriminatory nature by showing that similarly situated male workers were not treated similarly. In either case, the underlying notion was that a person should not suffer harassment, sexual or otherwise, in the workplace because of his or her sex.

Based upon these precedents, it was argued that Title VII's proscriptions against sex discrimination should be understood to prohibit not only sex harassment, but sexual harassment--that is, conduct of a sexual nature. In *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the D.C. Circuit Court of Appeals accepted the proposition that sexually hostile work environments were sexually discriminatory in nature. In *Bundy*, a female employee alleged that her immediate male supervisor had propositioned her numerous times and had frequently engaged in offensive sexual conversations with her. To make matters worse, when she reported the incidents to her supervisor's male superior, *he* asked her to go to a motel to have sex with him, and remarked that "any man in his right mind would want to rape you." *Id.* at 940. Relying on their 1977 decision in *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), the D.C. Circuit held that this conduct amounted to discrimination because of Sandra Bundy's sex. Noting that *Barnes* acknowledged the problem of *quid pro quo* harassment, the *Bundy* court extended the *Barnes* holding to instances of hostile environment harassment.

The "hostile environment" interpretation of Title VII, which

minority rights" which made him a "trouble-maker."); EEOC Dec. No. 71-1677, 3 Fair Empl. Prac. Cas. (BNA) 1242, 1243 (Apr. 12, 1971) (black female employee called "trouble-maker").

began with *Bundy* in 1981, culminated in this Court's statement in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), that discriminatory employment practices reached not only a "tangible loss" of "an economic character" because of a person's sex, *id.* at 64, but that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive environment." *Id.* at 66. Chief Justice Rehnquist declared, on behalf of an unanimous Court, that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64.

Sexual harassment could be understood to be a form of sex discrimination "without question" in *Meritor* because the law of workplace equality had evolved to the point where practices, both sexual and non-sexual in nature, that had the purpose or the effect of perpetuating forms of sex-role stereotyping, were taken to be paradigmatic cases of sex discrimination.

Such was the analysis adopted by the court in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1496 (M.D.Fla. 1991). There, women workers in the shipyards were forced to work in conditions in which they were constantly exposed to pictures of nude women, many in sexually suggestive or submissive positions, *id.* at 1494-96, comments of a sexual nature were directed at them repeatedly, *id.* at 1498-1500, they were touched on their breasts and other body parts, *id.* at 1499-1500, and the women were told numerous times that the men did not want to work with them, *id.* at 1498. In finding that these conditions created a sexually hostile work environment in violation of Title VII, the court credited expert testimony that showed that in circumstances such as those at the Jacksonville Shipyards, the "evaluation of women employees by their coworkers and supervisors takes place in terms of the sexuality of the women and their worth as sex objects rather than their merit as crafts workers." *Id.* at 1503. In addition, the testimony showed that sexual

stimuli in the workplace, such as nude pictures of women, "may encourage a significant proportion of the male population in the workforce to view and interact with women coworkers as if those women are sex objects." *Id.* Thus, the court concluded that "[t]he expert testimony ... provides solid evidence that the presence of the pictures ... sexualizes the work environment to the detriment of all female employees." *Id.* at 1523. *See also Doe v. City of Belleville, Illinois*, No. 94-3699, 1997 WL 400219 at *14 (7th Cir. 1997)(sexual harassment of women considered a form of sex stereotyping).

Just as it violated sex discrimination principles to prohibit women from working in the construction trades because this was "men's work," so too did sexual harassment violate laws prohibiting discrimination "because of sex": it has the effect of impermissibly stereotyping women workers as sex objects, rather than competent co-workers.

II. SAME-SEX SEXUAL HARASSMENT CAN BE A FORM OF SEX ROLE STEREOTYPING PROHIBITED BY TITLE VII

The principles of equality that animate Title VII sexual harassment doctrine in cases where the harasser and the victim are of different sexes can apply with equal force where the harasser and the victim are of the same sex. Yet, the Fifth Circuit in *Oncale* held that, as a matter of law, the sexual harassment of a man by another man or men could never constitute discrimination because of sex. In this view, the Fifth Circuit stands alone among the circuit courts of appeal that have reached the question. The Fourth, Sixth, Seventh, Eighth, and Eleventh circuits have all concluded, for varying reasons, that same-sex sexual harassment claims are actionable under Title VII. *See Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th

Cir. 1996),[10] *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997), *Doe v. City of Belleville*, 1997 WL 400219 (7th Cir. 1997), *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996), *Fredette v. BVP Management Assocs.*, 112 F.3d 1503 (11th Cir. 1997).

A. Title VII Prohibits The Sexual Harassment Of A Man By Other Men Because He Is Perceived To Be Insufficiently Masculine

The Seventh Circuit has provided the most recent and most thoroughgoing consideration of the justiciability of same-sex sexual harassment claims under Title VII.[11] In *Doe v. City of Belleville, Illinois*, 1997 WL 400219 (7th Cir. 1997), the court considered the sex discrimination claims of two brothers who alleged that they had

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[10]The Fourth Circuit's recognition of same-sex harassment claims is limited to those instances in which the plaintiff can demonstrate the harasser's homosexuality in fact. *See Wrightson*, 99 F.3d at 17. This view of the wrong of sexual harassment -- one which limits actionable conduct to the inappropriate expression of sexual desire -- is clearly misplaced. Plaintiffs in different-sex sexual harassment cases have never been required to demonstrate the heterosexuality of their harassers, nor should they. Persons who engage in offensive and unwelcome conduct of a sexual nature, whatever their sexual orientation, do so for a variety of reasons, such as disdain for the person harassed, a desire to force persons like the victim out of a particular type of job, a way of showing off to other workers, or sexual desire for the victim. There is no principled reason to adopt a special rule in same-sex, or any kind of sexual harassment cases with respect to proof of the sexual orientation of the harasser.

[11] A New Jersey trial court has also provided a principled way for understanding how same-sex sexual harassment can amount to sex discrimination. *See Zalewski v. Overlook Hospital*, 692 A.2d 131 (N.J. Sup.Ct.Jan. 29, 1996)(court found sexual harassment of male employee by male co-workers because they believed him to be a virgin and effeminate to be sex discrimination because he was perceived to be less than his coworkers' definition of masculine).

been subjected to "a relentless campaign of harassment by their male coworkers," *id.* at *1, because one of them, H. Doe, wore an earring and the other, J. Doe, was somewhat overweight. The harassment was principally initiated by one male coworker, an ex-Marine, who asked H. Doe whether he was a girl, called him "bitch," "fag," and "queer," and several times threatened to sexually assault him. *Id.*[12]

The court of appeals regarded these facts as presenting a "straightforward" case of sexual harassment prohibited by Title VII. *Id.* at *10.

> One can reasonably infer from the evidence before us that H. Doe was harassed 'because of' his gender. If that cannot be inferred from the sexual character of the harassment itself, it can be inferred from the harassers' evident belief that in wearing an earring, H. Doe did not conform to male standards. Thus the repeated inquiries as to whether he was "a guy or a girl," for example.

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[12]The facts of *Doe v. City of Belleville* are typical of many same-sex harassment cases where efforts to demean a person on account of their gender include homophobic insults, even where the harassers do not believe the victim to be homosexual. This is the case, it appears, in *Doe*, where the harassers held no belief that their victim was in fact gay, but merely deployed homophobic epithets as a means by which to harass him. *See also Gerd v. U.P.S., Inc.*, 934 F.Supp. 357, 358 (D.Colo. 1996)(male plaintiff asked whether his phone book contained "all your boyfriends [sic] numbers"); *Vandeventer v. Wabash National Corp.*, 887 F.Supp. 1178, n. 2 (N.D.Ind. 1995)(victim called a homosexual where there was no evidence or even allegation that the harasser believed the victim to be gay); *Morrison v. Dalton*, Appeal No. 01941037, 1994 WL 727943 *1 (E.E.O.C. Dec. No. 01940137)(July 14, 1994)(male plaintiff asked, "Hey faggot, where's your boyfriend?"); *Diiorio v. Perry*, Appeal No. 01941379, 1994 WL 741630 *1 (E.E.O.C. Dec. No 01941379)(November 22, 1994)(male plaintiff told that he "didn't have much muscle for a man"). These cases make clear how anti-gay sentiment can often be a form of, or at least a close relation to, sex stereotyping.

Id. at *9. Because the harassment of H. Doe was unmistakably gender-based, the court concluded that it amounted to discrimination "because of sex."[13]

Central to the Seventh Circuit's decision in *Doe*, and key to the resolution of cases such as Mr. Oncale's, is an appreciation of the connection between sexual harassment and gender stereotypes. That Title VII addresses gender stereotypes was made most clear in *Price Waterhouse, Inc. v. Hopkins*, 490 U.S. 228 (1989). There, the defendant accounting firm denied partnership to the plaintiff, Ann Hopkins, because she was "macho" and used profanity and because her superiors thought that she should take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. This Court held that Title VII prohibits discrimination against women who are not sufficiently feminine, stating that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250.

Price Waterhouse represented an important advance in Title VII law, one that provided the undergirding for the Seventh Circuit's decision in *Doe*. "[T]he fact that H. Doe was singled out for this

[13] In the opinion of *amici*, the Seventh Circuit's reasoning in *Doe* correctly applies traditional sexual harassment doctrine to a case of same-sex sexual harassment, in contrast to other cases where male plaintiffs lost their Title VII claims based upon sets of facts similar to those in *Doe*. *See Goluszek v. H.P. Smith*, 697 F.Supp. 1452 (N.D.Ill. 1988)(male harassed by other males because he blushed easily and was abnormally sensitive to comments pertaining to sex); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135 (S.D. Tex. 1993)(male plaintiff sexually harassed by male coworkers because he would not engage in their dirty conversations and because he had disapproved and complained of his co-workers' use of profanity at work); *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996)(sexually inexperienced developmentally disabled man sexually harassed by male co-workers).

abuse because [of] the way in which he projected the sexual aspect of his personality," rendered the complained of conduct discrimination "because of sex." *Doe v. City of Belleville*, 1997 WL 400219 at *15-*16. *Price Waterhouse* instructed that employment decisions made on the basis of *gender role identity* are discrimination "because of one's sex." The Fifth Circuit ignored this principle in *Oncale*.

B. The Fifth Circuit Erred In Requiring A Showing of Class-Based Treatment to Establish Discriminatory Intent

The circuit court below relied heavily upon an unpublished Fifth Circuit opinion in which the court dismissed a male plaintiff's allegations that he had been sexually harassed by another man. *Oncale*, 83 F.3d at 119-120, *citing*, *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir. 1993)(per curium)(unpublished), *cert. denied*, 513 U.S. 925 (1994). The court summarized the *Giddens* holding as, "male-on-male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex." *Id.* at 120. The court then went on to cite the only other same-sex sexual harassment opinion from the Fifth Circuit, *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446 (5th Cir. 1994), for the proposition that "Title VII addresses gender discrimination ...Thus, what Locke [the male defendant] did to Garcia [the male plaintiff] could not in any event constitute sexual harassment within the purview of Title VII." *Id.* at 120 (internal quotation marks omitted).

However, the court's conclusion - that male-on-male sexual harassment could never constitute a form of sex discrimination - does not follow, ineluctably or otherwise, from the two premises upon which the court relied - i) that "because of sex" is an element of the

sexual harassment plaintiff's prima facie case, and ii) that Title VII prohibits gender discrimination.

To demand, as did the Fifth Circuit below, that the sexual harassment plaintiff show that he or she was treated "differently because of his [or her] sex," *Oncale*, 83 F.3d at 120, is to conceive of sexual harassment solely as a form of disparate treatment. While proof of disparate treatment is sufficient to make out a sexual harassment claim under Title VII, it is not necessary. For example, in *Robinson v. Jacksonville Shipyards*, the evidence demonstrated, among other things, that the women workers as a group were sexually harassed precisely because they were women - they were unwelcome female workers in the previously all-male shipyard. *Robinson*, 760 F.Supp. at 1498. Similarly, in *Hall v. Gus Const.Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988), women who worked on a road construction crew were targeted for harassment of both a sexual and non-sexual nature because they were women. *Id.* at 1014. In cases of this kind - frequently cases in which women have obtained jobs traditionally held by men - the easiest way for the female plaintiffs to make out their prima facie case is to show that women as a class were treated differently than men. The fact that the harassing conduct was sexual in nature may make the harm particularly painful for the female victims, but proof of its sexual nature is not a necessary element of the plaintiff's burden of showing that the conduct was undertaken because of sex: women and men were treated differently, whatever the content of the offensive conduct.

While class-based proof of the disparate treatment of workers on the basis of sex may be sufficient to make out the plaintiff's case, it is not necessary that the plaintiff show that all or many members of his or her class were so treated. Surely Title VII does not require that either male or female sexual harassment plaintiffs establish themselves as fungible representatives of their "sexual group" in order to make out a claim of sex discrimination.

Yet the Fifth Circuit opinion in *Oncale* cites approvingly *Goluszek v. H.P. Smith*, 697 F.Supp. 1452 (N.D.Ill. 1988),[14] in which the court required that the sexual harassment plaintiff show that he worked in an "antimale environment." *Id.* at 1456. As Professor Kathryn Abrams observed in her analysis of the *Goluszek* case, the antimale environment rule requires a showing that

> the behavior challenged must operate, in some respect, against all members of the protected group. . . . [I]n other words, it could have happened to any man, but not to any woman. In *Goluszek*, the court took this categorical logic one step further: it must be treatment that not only could have happened to any man but tends to reflect negatively on men as a group or create an environment hostile to men.

Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH.L.REV. 2479, 2514 (1994). Such a standard imposes an inappropriately heavy burden on plaintiffs while encouraging defendants to produce other members of the plaintiff's sex who could testify to the fact that they, as a woman, or as a man--that is, in their capacity as class representatives--did not regard the conduct complained of as offensive.

In *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996), for instance, a male employee objected to a common workplace antic called "bagging." "Bagging" is a practice whereby a person is grabbed from behind, picked up off the ground, and another person squeezes the victim's testicles. *Quick v. Donaldson Co.*, 895 F.Supp. 1288, 1292 (S.D.Iowa 1995), *rev'd*, 90 F.3d 1372 (8th Cir.

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[14]The Seventh Circuit in *Doe v. City of Belleville*, all but overruled the *Goluszek* decision: "[w]e therefore reject the narrow construction of Title VII advanced in Goluszek ..." 1997 WL 400219 at *9.

1996)("Quick alleges that at least twelve different male co-workers bagged him on some 100 occasions.") When Quick complained about this behavior, his employer "told him that the next time somebody bagged him 'to turn around and bag the shit out of them.'". *Quick*, 90 F.3d at 1375.

In *Quick*, the Eighth Circuit found that a same-sex sexual harassment plaintiff could survive a summary judgment motion if there were some evidence that male employees, but not female employees, were bagged in this workplace. In that case, "a fact-finder could reasonably conclude that the treatment of men ... was worse than the treatment of women." *Id.* at 1379. This is, of course, a demand for proof of the disparate treatment of men and women. But such a demand would be impossible to meet in an all-male workplace such as that in which Oncale worked, and in which many same-sex harassment claims arise. Again, while traditional disparate treatment evidence would be sufficient to prove that the offending conduct was undertaken because of sex, it is not necessary.

The antimale or antifemale requirement also raises problems of ripeness, as the court in *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351 (D. Nev. 1996), correctly observed:

> Title VII creates an individual claim which is ripe before the work environment has been poisoned for all workers of one sex or the other. It does not require that the work environment be hostile to all workers of the plaintiff's sex; it requires that the environment be hostile to the plaintiff.

Id. at 354 (citations omitted). Thus, the because of sex element of the sexual harassment plaintiff's case *can* be met by showing that women and only women, or men and only men, were singled out for sexually harassing treatment, but it need not be.

Relatedly, the fact that the harasser and the victim are of different sexes may reinforce a plaintiff's claim of discrimination, but it is not necessary to the claim. In *Price Waterhouse* the Court recognized that Ann Hopkins was denied partnership because she was insufficiently feminine to conform to the accepted gender stereotypes at her firm, not because the partners making the decision were all men. Yet, according to the Fifth Circuit rule, if some or all of the partners at Price Waterhouse had been women who disapproved of Hopkins' gender identity, and for that reason they denied her partnership, that adverse job action "could not in any event constitute sexual [discrimination] within the purview of Title VII." *Oncale*, 83 F.3d at 120, *quoting*, *Garcia*, 28 F.3d at 452. The fact that it might have been women and men together, or women exclusively who enforced a gender stereotype in *Price Waterhouse*, should not render their conduct inoffensive to Title VII. Just as courts have recognized that federal anti-discrimination laws prohibit *intra*-racial discrimination on the basis of race, *see e.g. Walker v. Secretary of Treasury, I.R.S.*, 713 F.Supp. 403 (N.D.Ga. 1989)(Title VII); *Hansborough v. City of Elkhart Parks and Rec. Dept.*, 802 F.Supp. 199 (N.D.Ind. 1992)(Title VII); *Rodriguez v. Gattuso*, 795 F.Supp. 860 (N.D. Ill. 1992)(Fair Housing Act); *Franceschi v. Hyatt Corp.*, 782 F.Supp. 712 (D.Pr. 1992)(§ 1981), so too should Title VII be interpreted to prohibit *intra*-sexual discrimination on the basis of sex. Nothing within either the text or history of Title VII requires that the perpetrator and the victim of sex-based discrimination be of different sexes.

III. UNWELCOME, SEXUAL CONDUCT DIRECTED TOWARD A MEMBER OF THE SAME SEX MAY CONSTITUTE SEX DISCRIMINATION EVEN IN THE ABSENCE OF A SHOWING OF DISPARATE TREATMENT

In traditional harassment cases where the plaintiff alleges

hostile conduct of a sexual nature, most courts, including this Court in *Meritor*, are willing to infer,[15] if not conclude,[16] that the conduct was based upon sex without demanding any specific proof thereof beyond the sexual nature of the conduct. In the traditional sexual harassment scenario, where a man has engaged in unwelcome and offensive sexual conduct toward a woman in the workplace, proof of conduct that is consistent with the description of sexual harassment in the EEOC Guidelines[17] will typically establish a prima facie case. Proof of the "because of sex" element is generally not required;

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[15] *See, e.g., Smolsky v. Consolidated Rail Co.*, 780 F. Supp. 283, 295 (E.D. Pa. 1991) (comments such as "[I] would like to 'get into her pants' . . . . create the inference that the harassment and discrimination where [sic] intentional and based on the fact that the plaintiff was a woman"); *Robinson v. Jacksonville Shipyards Inc.*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) ("[S]exual behavior directed at women will raise *the inference* that the harassment is based on their sex.") (emphasis added) (*citing Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904-05 (11th Cir. 1988)).

[16] *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) ("The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language *is implicit, and thus should be recognized as a matter of course*. A more fact intensive analysis will be necessary where the actions are not sexual by their very nature.") (emphasis added); *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988) (finding offensive and sexual nature of cartoons sufficient to establish that harassment was based on sex); *Konstantopoulos v. Westvaco Corp.*, 893 F. Supp. 1263, 1277 (D. Del. 1994), *aff'd*, 112 F.3d 710 (3d Cir. 1997)("Because at least some of the conduct at issue was sexually explicit, it is fair to draw the conclusion that, by virtue of this conduct, plaintiff suffered intentional discrimination because of her sex.").

[17] The EEOC guidelines provide that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1981).

"once the plaintiff in such a case proves that harassment took place, the most difficult legal question typically will concern the responsibility of the employer for that harassment." *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983).

Thus, on *Meritor*'s and *Robinson*'s facts, where a man is charged with sexually harassing a woman, and the conduct is severe or pervasive, unwelcome, and hostile to a reasonable person, courts often regard the conduct as a kind of *per se* violation of Title VII. It is both reasonable and efficient to draw this inference in the typical sexual harassment case where a man subjects a woman to offensive sexual comments, come-ons, or physical abuse because sexist stereotyping is what the unwelcome sexual conduct *means* under these circumstances. *See Doe v. City of Belleville, Illinois*, 1997 WL 400219 at *9 (7th Cir. 1997).

But what of same-sex harassment? Can the same inferences be drawn when a man is the victim of offensive and unwelcome sexual conduct, such as that alleged by Mr. Oncale? Not as easily, yet the recognition that such sexual conduct is not <u>always</u> discriminatory does not support the Fifth Circuit's conclusion that it can <u>never</u> be discriminatory. In effect, the Fifth Circuit's reasoning in *Oncale* signals a return to the draconian treatment female sexual harassment plaintiffs received in the 1970s. *See Corne v. Bausch and Lomb, Inc.*, 390 F. Supp. 161 (D.Ariz. 1975). The Fifth Circuit has misunderstood the connection between unwelcome conduct of a sexual nature and sex stereotyping, just as courts misunderstood the relationship between sexual harassment and the sex stereotyping of women two decades ago. Contemporary Title VII doctrine has advanced well beyond this narrow view of the harm of sexual harassment.

Given that the Fifth Circuit was clearly wrong to hold, as a matter of law, that a man can never discriminate against another man,

the question remains, could unwelcome and offensive conduct of a sexual nature between persons of the same sex be reasonably understood as discriminatory under Title VII? Clearly it can. Where a male employee, for instance, endures offensive and unwelcome sexual harassment from his male coworkers because he does not live up to a stereotypic norm of proper masculinity, that person has been discriminated against because of his sex just as surely as Ann Hopkins was for failing to live up to the Price Waterhouse partners' stereotype of femininity.

When unwelcome and offense conduct of a sexual nature is used as a means to humiliate, intimidate or harass a person because of his or her gender identity, whether between persons of different or the same sexes, prior Supreme Court precedent as well as the plain meaning of Title VII supports the proposition that this conduct was "undertaken because of sex."

Other evidence may also suffice to show that same-sex sexual harassment amounts to discrimination because of sex. Consider, for instance, a workplace culture which is permeated by a kind of "locker room" mentality, in that men engage in sexual conduct toward each other, and no one particular man is singled out for more egregious treatment, as was H. Doe. If one man or men regards the behavior offensive and unwelcome, makes his objection to the conduct known, and he becomes the target of continuing offensive sexual conduct, then a fact-finder could reasonably conclude that the conduct was undertaken because of sex.

In *Quick v. Donaldson Co.*, for instance, the circuit court could also have invited additional evidence as to whether Quick was selected for bagging or other offensive conduct precisely because he had made his objections to the practice known. Indeed, there is some

evidence in the court's opinion that this might have been the case.[18]

Here, *amici* urge that the Court reverse the court of appeals' determination that Title VII bars all same-sex sexual harassment claims, and remand the case for further fact-finding with respect to the circumstances under which Mr. Oncale alleges he was sexually harassed in order to determine whether that harassment amounted to discrimination because of sex. A more extensive inquiry is appropriate where, as here, the inferences that can reasonably be drawn in traditional sexual harassment cases - to wit, that the conduct has the purpose or effect of perpetuating sex stereotyping - cannot be so easily inferred from the sexual nature of the conduct. Among the evidence that the trial court may find probative on this point is whether Mr. Oncale was singled out for harassment because of his failure to live up to some standard of masculinity, or whether he suffered continued offensive sexual conduct because he objected to a hyper-masculine environment in his all-male workplace.

CONCLUSION

The Court should find that the prohibitions against workplace sex discrimination contained in Title VII include a prohibition against same-sex sexual harassment when such conduct was undertaken because of sex.

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[18]It appears that after Quick objected to being bagged, the violence he suffered escalated to a point where he was punched in the neck. *Quick*, 895 F.Supp. 1288, 1292.

Respectfully submitted,
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Dated: August 11, 1997

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(12)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOSEPH ONCALE,

Petitioner,

—v.—

SUNDOWNER OFFSHORE SERVICES, INC. ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Amici are law professors who teach employment law, discrimination law, women, gender, or race and the law. Because federal courts across the country have disposed of Title VII same-sex sexual harassment claims in inconsistent ways, and because we have studied the history and fundamental principles that underlie sexual harassment doctrine specifically, and discrimination laws generally, we provide the Court with our understanding of the issues raised in this case.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court. A complete list of *amici* is set forth in Appendix A.[1]

SUMMARY OF THE ARGUMENT

The court of appeals erred in holding that Title VII "does not recognize male-on-male [sexual harassment] claims." *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118, 120 (5th Cir. 1996). Such a blanket rule barring same-sex sexual harassment claims under Title VII finds no support in either the text of Title VII, or in the jurisprudential history of sexual harassment doctrine.

Amici urge the Court to reverse the Fifth Circuit Court of

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[1] This brief was authored by the *amici* and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No one other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

Appeals' determination that Title VII bars all same-sex sexual harassment claims, and remand the case for further fact-finding with respect to the circumstances under which Mr. Oncale alleges he was sexually harassed. Such an inquiry is necessary in cases of this kind to determine whether the harassment amounted to discrimination because of sex. The inferences that can be reasonably drawn in traditional sexual harassment cases - to wit, that the conduct is a form of sex discrimination prohibited by Title VII - cannot be so easily drawn from the conduct in same-sex sexual harassment cases. Nevertheless, though a more extensive inquiry may be called for, many same-sex harassment cases fit easily within Title VII's definition of sex discrimination. Among the types of evidence that the trial court may find probative on this point are whether Mr. Oncale was singled out for harassment because he did not conform to traditional norms of masculinity, and/or whether he suffered continued offensive sexual conduct because he objected to the hyper-masculine environment that characterizes many all-male workplaces.

ARGUMENT

As the discussion that follows amply demonstrates, sexual harassment has been understood by the courts to be a form of sex stereotyping that offends Title VII. *Amici* will briefly set out the history of sexual harassment doctrine and the theories under which unwelcome conduct of a sexual nature in the workplace has come to be understood as a form of sex discrimination. This discussion will make clear that the sexual equality principles at stake in different-sex sexual harassment cases may be present in same-sex sexual harassment as well, making same-sex sexual harassment cases actionable under Title VII. *See generally*, Katherine M.

Franke, *What's Wrong With Sexual Harassment?*, 49 STAN.L.REV. 691 (1997). In our view, the Fifth Circuit's ruling fails to appreciate why sexual harassment of any kind is a form of sex discrimination by ignoring the ways in which sex stereotyping can manifest itself in the workplace.

Neither the text of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, nor well-established sexual harassment doctrine supports the Fifth Circuit's blanket rule barring sexual harassment claims between persons of the same sex. The principles at work in traditional sexual harassment cases - where a man is charged with sexually harassing a woman - can apply with equal force where victim and harasser are of the same sex. This Court reiterated in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), that when an employer acts on the basis of sex stereotyping, the employer has acted on the basis of gender in violation of Title VII. Sexual harassment is a form of sex stereotyping. *See, e.g., Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 861 n. 15 (3d Cir. 1990). Not in *Price Waterhouse, Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 7 (1986), *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), nor in any other decision construing the meaning of "discrimination because of sex" has this Court required that the party acting on the basis of sex stereotyping be of a different sex from the victim thereof.

I. FOR OVER TWO DECADES, SEXUAL HARASSMENT LAW HAS PROHIBITED CONDUCT THAT REINFORCES SEX STEREOTYPES IN THE WORKPLACE

The concept of sexual harassment as a kind of sex

discrimination is now well-established. After a period of unsuccessful litigation in which sexual harassment claims were dismissed under a "boys will be boys" view of the harm, in the late 1970s and early 1980s courts began to recognize that unwelcome sexual conduct in the workplace should be understood as a form of discrimination because of sex.

Early sexual harassment litigation produced a series of defeats for plaintiffs who sought to challenge sexually harassing work environments under Title VII. In *Corne v. Bausch and Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded without reported decision*, 562 F.2d 55 (9th Cir. 1977), one of the first sexual harassment cases litigated under Title VII, two female clerical workers alleged that onerous verbal and physical sexual harassment by their immediate male supervisor amounted to discrimination on the basis of sex. The court recognized that Title VII extended beyond discriminatory hiring or firing to the terms and conditions of employment once hired, but nevertheless rejected the plaintiff's harassment theory. In prior cases, the court observed, the discriminatory acts had been undertaken pursuant to company policy, or in pursuit of some relative corporate advantage derived from the discriminatory practices. *Id.* at 163. The sexually harassing conduct of which Corne complained, however, was different:

> In the present case, [harasser's] conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, [harasser] was satisfying a personal urge. Certainly no employer policy is here involved.... [A]n outgrowth of holding such

> activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.

Id. at 163-64. The court's reasoning in *Corne* is representative of the treatment sexual harassment claims received generally during this period.[2] On this view, sexual content or coercion in workplace relationships is merely the inevitable result of a sexually heterogeneous workplace -- it is the price women pay for participating equally in the wage-labor market.

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[2] *See e.g. Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977)(court dismissed female employees charge that she had been discriminated against because her boss asked her to lunch, then became drunk, made sexual advances toward her, and threatened retaliation when she tried to leave the restaurant. "[N]atural sexual attraction can be subtle. If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time."); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976)("It is conceivable, under plaintiff's theory that flirtations of the smallest order would give rise to liability. The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions."), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979).

On one level, the early sexual harassment cases were about determining employer responsibility under Title VII in light of pre-existing agency principles. On a deeper level, however, the cases legitimized a view of workplace sexual harassment that regards the plaintiffs' claims as private "gripes" rather than discriminatory "grievances," and regards the defendants' conduct as horseplay or locker room antics - normal and healthy manifestations of male sexuality that have simply gotten out of hand. This mistaken view of the scope and meaning of Title VII generally, and sexual harassment specifically, was short lived as courts came to appreciate the discriminatory nature of sexual harassment.

Rather than conceptualize sexual harassment as an independent wrong of sexual misconduct, in the late 1970s advocates for women's rights argued that the conduct was a species of sex discrimination, because "only the sex discrimination laws provide a coherent examination of sexually harassing conduct as a legal wrong." Sarah E. Burns, *Issues in Workplace Sexual Harassment Law and Related Social Science Research*, J. SOC. ISSUES, Spring 1995, at 193 (citation omitted). Advocates reframed the problem of sexual harassment as a problem of sex-based power. In SEXUAL HARASSMENT OF WORKING WOMEN (1979), Catharine MacKinnon argued that sexual harassment is sex discrimination because it causes arbitrary differentiation between men and women in the workplace, such that "men are not placed in comparable positions to women when they are comparably circumstanced." *Id* at 216. In short, "[s]exual harassment limits women in a way men are not limited. It deprives them of opportunities that are available to male employees without sexual conditions." *Id.* at 193.

To show that sexual harassment was sex discrimination, feminist advocates began with the relatively small body of Title VII sex and race discrimination cases decided in the mid to late 1970s. The case for finding *quid pro quo* harassment a violation of Title VII was the easiest to make. In 1977, the D.C. Circuit first recognized that the conditioning of employment-related economic benefits on sexual favors was sex discrimination. In *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), the plaintiff alleged that her job had been eliminated by her male supervisor because she refused his sexual advances; advances that would not have been tendered had Barnes been a man. *Id.* at 985. The Court of Appeals held that

> [b]ut for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel.

Id. at 990 (footnotes omitted).

Courts were slower, however, to recognize the hostile environment theory of sexual harassment. Again, looking to existing sex and race discrimination jurisprudence, advocates argued that sexual harassment should be prohibited under Title VII. Title VII's antidiscrimination prohibitions applied not only to actions of an economic nature, such as hiring, firing, or promotions, but also to the noneconomic "terms, conditions, or

privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (1994). Early "terms and conditions" cases established, on a case by case basis, that Title VII prohibited a range of practices that granted women lesser workplace privileges than men.[3] Ultimately, these practices were found to violate Title VII because Congress intended that the law strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13

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[3] *See, e.g., Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 194 n.3 (6th Cir. 1978) (giving female physical education teachers inferior locker and shower facilities); *Trivett v. Tri-State Container Corp.*, 7 Fair Empl. Prac. Cas. (BNA) 1292, 1296 (E.D. Tenn 1973)(requiring female employees to remain at their posts while allowing male employees to line up and clock out first); *Laffey v. Northwest Airlines, Inc.*, 6 Fair Empl. Prac. Cas. (BNA) 902, 910-912 (D.D.C. 1973) (imposing height and weight requirements for female but not male employees, forbidding female but not male employees from wearing eyeglasses, and imposing a no-marriage rule on female but not male employees); *Richards v. Griffith Rubber Mills*, 30 F. Supp. 338, 339-40 (D. Or. 1969)(requiring mandatory rest periods for female workers only, thereby eliminating females from consideration for certain positions); EEOC Dec. No. 71-109, 1973 EEOC Dec.(CCH) § 6165, at 4277-78 (July 29, 1970) (affording men, but not women, the right to smoke while they worked): EEOC Dec. No. 70-503, 1973 EEOC Dec. (CCH) § 6114, at 4207-08 (Feb. 4. 1970) (paying death benefits to surviving spouses of male employees, but not female employees); *Nabisco Settles Restroom-Break Suit*, 1996 Daily Lab. Rpt. (BNA) 77 (April 22. 1996) (discussing *Hernandez v. Nabisco, Co.*, No. CV 153713 (Cal. Sup. Ct. Apr. 17, 1996)) (women allowed to use the restroom only during breaks, whereas men allowed to do so anytime they wanted).

(1978), *quoting, Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).[4]

Having established that Title VII did not necessarily require a showing of wage-based injury, courts soon recognized that harassing conduct could alter the work environment in a discriminatory manner just as surely as policies that provided men and women with different amenities or imposed different sex-based rules.

Courts first recognized that harassment could constitute a discriminatory term or condition of employment in national origin and race cases. In *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), the plaintiff challenged the offensive work environment created by her employer, an optometrist who operated his practice in a discriminatory manner by

> "segregating," his Hispanic and Anglo patients. The Fifth Circuit held that the phrase "terms, conditions privileges of employment" in [Title VII] is an expansive concept which sweeps within its

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[4] This language was again cited approvingly by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. at 228, and *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 64 (1986); *see also* Nadine Taub, *Keeping Women in Their Place: Stereotyping* Per Se *as a Form of Employment Discrimination*, 21 B.C. L. Rev. 345, 349 (1980) (charging that "stereotypical role expectations" have hampered the effectiveness of Title VII in combating workplace discrimination directed against women, and arguing that they be recognized as "discrimination *per se*").

> protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination ... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers...

Id. at 238. The *Rogers* conception of national origin based discriminatory workplace "pollution" was later extended to workplace harassment based upon race,[5] and religion.[6]

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[5]*See e.g., Swint v. Pullman-Standard*, 539 F.2d 77, 89-90 (5th Cir. 1976) (discriminatory job assignments, even absent salary discrimination or economic harm); *Steadman v. Hundley*, 421 F. Supp. 53, 57 (N.D. Ill. 1976) (supervisor's racial slurs and unfairly adverse recommendations may lead to Title VII violation); *Murry v. American Standard, Inc.*, 373 F. Supp. 716, 717 (E.D. La. 1973)(black employee called "boy"), *aff'd*, 488 F.2d 529 (5th Cir. 1973); EEOC Dec. No. 72-1561, 4 Fair Empl. Prac. Cas. (BNA) 852, 852 (May 12, 1972) (racially derogatory graffiti); EEOC Dec. No. 72-0957, 4 Fair Empl. Prac. Cas. (BNA) 837, 837-38 (Feb. 2, 1972) (racial joke using "nigger" in training program); EEOC Dec. No. 72-0779, 4 Fair Empl. Prac. Cas. (BNA) 317, 317-18 (Dec. 30, 1971) (black employee called "nigger"); EEOC Dec. No. 71-720, 3 Fair Empl. Prac. Cas. (BNA) 142, 142 (Dec. 17, 1970) (black employee called "little black Sambo").

[6]*See, e.g., Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) (supervisor's demeaning religious slurs); *Rattner v. Trans World Airlines*, City of New York Commission on Human Rights, Decision No. 4135-J, September 11, 1973

In time, courts further interpreted Title VII to prohibit sex-based harassment. Note that *sex-based* harassment is not the same thing as *sexual* harassment.[7] Sex-based harassment occurs when a person is harassed in the workplace because of her or his sex through the use of nonsexual conduct. Examples of nonsexual, sex-based conduct include indicating that women shouldn't perform certain kinds of work, *Lipsett v. University of P.R.*, 864 F.2d [illegible] 906 (1st Cir. 1988) (comments that women should not be surgeons), that a "woman's place [is] in the bedroom or the kitchen," *Fox v. Southeast Transp., Inc.*, Civ.A. Nos. 89-1442-WF, 89-1449-WF, 1993 WL 543203 at *2 (D Mass. Dec. 9, 1993), *aff'd*, 25 F.3d 1037 (1st Cir. 1994), that hiring women was undesirable because they would quit and get married, *Parton v. GTE North, Inc.*, 802 F. Supp. 241, 245-46 (W.D. Mo. 1991), *aff'd*, 971 F.2d 150 (8th Cir. 1992), or that they were taking jobs from men with families, *Fox*, 1993 WL 543203 at *2. These early sex-based harassment cases, like the race-based harassment cases, took one of two principal forms: the harassment either conveyed

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(antisemitic graffiti).

[7]*See Harassment on the Basis of Sex and Related Conduct Not Constituting Sexual Harassment*, E.E.O.C. Comp. Man. (CCH) § 615.6. ¶3105, at 3217 (Jan. 1982) ("Sexual harassment is one type of harassment based on sex. However, it is not the only type of unlawful harassment which is sex-based or which stems from sex discrimination. For proper processing and investigation of harassment charges, it is important to correctly distinguish sexual harassment from other forms of sex-based harassment and related conduct.")

the harasser's subjective discriminatory mental state (e.g., women should stay home and have babies or are not fit for certain types of work), or it could have been motivated by a number of reasons, including sexist attitudes (e.g., denying female workers adequate breaks.) *See* EEOC Dec. No. 71-2046, 1973 EEOC Dec. (CCH) ¶ 62[illegible] at 4428 (May 12, 1971) (female employees as a class placed in shifts that did not qualify for breaks).

In the first kind of case, the discriminatory nature of the harassment was transparent from the substance of the harassing conduct--it bespoke sex stereotyping. These cases factually echoed early race-based harassment cases in which African Americans were harassed for being "uppity"[8] or "trouble-makers."[9] In both

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[8]*See, e.g., Robertson v. Granite Sch. Dist.*, No. 90-4164, 1992 WL 2883, at *2 (10th Cir. Jan 7, 1992) (African-American male school coach terminated in part because he was "an uppity nigger"); *Williams v. Cerberonics*, 871 F.2d 452, 456 (4th Cir.1989) (terminated African-American woman referred to as that "black uppity female"); *Marable v. H. Walker & Assoc.*, 644 F.2d 390, 396 (5th Cir. 1981)(finding that a landlord refused to rent to African-American man because, *inter alia*, he was "uppity"); EEOC Dec. No. 70-198, 1973 EEOC Dec. (CCH) ¶ 6087, at 4133 (Oct. 9, 1969) (black employee discharged because his self-confident manner caused resentment among white employees).

[9] *See, e.g., Daugherty v. City of Danville*, No. 87-5850, 1988 WL 90892 at *4 (6th Cir. Sept. 1, 1988) (former African-American police officer alleged chief of police said he wanted to weed out "nigger troublemakers"); *Thomas v. Daniel Parker*, Civ. A. No. 76-1852, 1979 WL 149 at *7 (D.D.C. Feb. 8. 1979) (black Foreign Service officer denied tenure because he was "greatly concerned with

contexts, the harassment was undertaken because women and/or people of color had violated gender and race stereotypes. In the second kind of case, however, further evidence was necessary to prove that the harassing conduct was undertaken "because of the target's sex." This additional evidence put the harassment in a context that revealed its discriminatory nature by showing that similarly situated male workers were not treated similarly. In either case, the underlying notion was that a person should not suffer harassment, sexual or otherwise, in the workplace because of his or her sex.

Based upon these precedents, it was argued that Title VII's proscriptions against sex discrimination should be understood to prohibit not only sex harassment, but sexual harassment--that is, conduct of a sexual nature. In *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the D.C. Circuit Court of Appeals accepted the proposition that sexually hostile work environments were sexually discriminatory in nature. In *Bundy*, a female employee alleged that her immediate male supervisor had propositioned her numerous times and had frequently engaged in offensive sexual conversations with her. To make matters worse, when she reported the incidents to her supervisor's male superior, *he* asked her to go to a motel to have sex with him, and remarked that "any man in his right mind would want to rape you." *Id.* at 940. Relying on their 1977 decision in *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), the D.C. Circuit held that this conduct amounted to discrimination because of Sandra Bundy's sex. Noting that *Barnes* acknowledged

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minority rights" which made him a "trouble-maker."); EEOC Dec. No. 71-1677, 3 Fair Empl. Prac. Cas. (BNA) 1242, 1243 (Apr. 12, 1971)(black female employee called "trouble-maker").

the problem of *quid pro quo* harassment, the *Bundy* court extended the *Barnes* holding to instances of hostile environment harassment.

The "hostile environment" interpretation of Title VII, which began with *Bundy* in 1981, culminated in this Court's statement in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), that discriminatory employment practices reached not only a "tangible loss" of "an economic character" because of a person's sex, *id.* at 64, but that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive environment." *Id.* at 66. Chief Justice Rehnquist declared on behalf of an unanimous Court that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64.

Sexual harassment could be understood to be a form of sex discrimination "without question" in *Meritor* because the law of workplace equality had evolved to the point where practices, both sexual and non-sexual in nature, that had the purpose or the effect of perpetuating forms of sex-role stereotyping, were taken to be paradigmatic cases of sex discrimination.

Such was the analysis adopted by the court in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1496 (M.D.Fla. 1991). There, women workers in the shipyards were forced to work in conditions in which they were constantly exposed to pictures of nude women, many in sexually suggestive or submissive positions, *id.* at 1494-96, comments of a sexual nature were directed at them repeatedly, *id.* at 1498-1500, they were touched on their breasts and other body parts, *id.* at 1499-1500, and the women were told

numerous times that the men did not want to work with them, *id.* at 1498. In finding, that these conditions created a sexually hostile work environment in violation of Title VII, the court credited expert testimony that showed that in circumstances such as those at the Jacksonville Shipyards, the "evaluation of women employees by their coworkers and supervisors takes place in terms of the sexuality of the women and their worth as sex objects rather than their merit as crafts workers." *Id.* at 1503. In addition, the testimony showed that sexual stimuli in the workplace, such as nude pictures of women, "may encourage a significant proportion of the male population in the workforce to view and interact with women coworkers as if those women are sex objects." *Id.* Thus, the court concluded that "[t]he expert testimony ... provides solid evidence that the presence of the pictures ... sexualizes the work environment to the detriment of all female employees." *Id.* at 1523. *See also Doe v. City of Belleville, Illinois*, 119 F.3d 563 (7th Cir. 1997)(sexual harassment of women considered a form of sex stereotyping).

Just as it violated sex discrimination principles to prohibit women from working in the construction trades because this was "men's work," so too did sexual harassment violate laws prohibiting discrimination "because of sex": it has the effect of impermissibly stereotyping women workers as sex objects, rather than competent co-workers.

II. SAME-SEX SEXUAL HARASSMENT CAN BE A FORM OF SEX ROLE STEREOTYPING PROHIBITED BY TITLE VII

The principles of equality that animate Title VII sexual

harassment doctrine in cases where the harasser and the victim are of different sexes can apply with equal force where the harasser and the victim are of the same sex. Yet, the Fifth Circuit in *Oncale* held that, as a matter of law, the sexual harassment of a man by another man or men could never constitute discrimination because of sex. In this view, the Fifth Circuit stands alone among the circuit courts of appeal that have reached the question. The Fourth, Sixth, Seventh, Eighth, and Eleventh circuits have all concluded, for varying reasons, that same-sex sexual harassment claims are actionable under Title VII. See *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996),[10] *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997), *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996), *Fredette v. BVP Management Assocs.*, 112 F.3d 1503 (11th Cir. 1997).

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[10] The Fourth Circuit's recognition of same-sex harassment claims is limited to those instances in which the plaintiff can demonstrate the harasser's homosexuality-in-fact. *See Wrightson*, 99 F.3d at 17. This view of the wrong of sexual harassment -- one which limits actionable conduct to the inappropriate expression of sexual desire – is clearly misplaced. Plaintiffs in different-sex sexual harassment cases have never been required to demonstrate the heterosexuality of their harassers, nor should they. Persons who engage in offensive and unwelcome conduct of a sexual nature, whatever their sexual orientation, do so for a variety of reasons, such as disdain for the person harassed, a desire to force persons like the victim out of a particular type of job, a way of showing off to other workers, or sexual desire for the victim. There is no principled reason to adopt a special rule in same-sex sexual harassment cases with respect to proof of the sexual orientation of the harasser.

A. Title VII Prohibits The Sexual Harassment Of A Man By Other Men Because He Is Perceived To Be Insufficiently Masculine

The Seventh Circuit has provided the most recent and most thoroughgoing consideration of the justiciability of same-sex sexual harassment claims under Title VII.[11] In *Doe v. City of Belleville, Illinois*, 119 F.3d 563 (7th Cir. 1997), the court considered the sex discrimination claims of two brothers who alleged that they had been subjected to "a relentless campaign of harassment by their male coworkers," *id.* at 566, because one of them, H.Doe, wore an earring and the other, J. Doe, was somewhat overweight. The harassment was principally initiated by one male coworker, an ex-Marine, who asked H. Doe whether he was a girl, called him "bitch," "fag" and "queer," and several times threatened to sexually assault him. *Id.* at 566-67.[12]

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[11] A New Jersey trial court has also provided a principled way to understand how same-sex sexual harassment can amount to sex discrimination. *See Zalewski v. Overlook Hospital*, 692 A.2d 131 (N.J. Sup.Ct. 1996)(court found sexual harassment of male employee by male coworkers because they believed him to be a virgin and effeminate to be sex discrimination because he was perceived by his male coworkers as insufficiently masculine).

[12] The facts of *Doe v. City of Belleville* are typical of many same-sex harassment cases where efforts to demean a person on account of their gender include homophobic insults, even where the harassers do not believe the victim to be homosexual. This was the case, it appears, in *Doe*, where the harassers held no belief that their

The court of appeals regarded these facts as presenting a "straightforward" case of sexual harassment prohibited by Title VII. *Id.* at 575.

> One may reasonably infer from the evidence before us that H. Doe was harassed 'because of' his gender. If that cannot be inferred from the sexual character of the harassment itself, it can be inferred from the harassers' evident belief that in wearing an earring, H. Doe did not conform to male standards. Thus the repeated inquiries as to whether he was "a guy or a girl," for example.

Id. Because the harassment of H. Doe was unmistakably gender-based, the court concluded that it amounted to discrimination

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victim was in fact gay, but merely deployed homophobic epithets as a means by which to harass him. *See also Gerd v. U.P.S., Inc.*, 934 F.Supp. 357. 358 (D.Colo. 1996)(male plaintiff asked whether his phone book contained "all your boyfriends [sic] numbers"); *Vandeventer v. Wabash National Corp.*, 887 F.Supp. 1178 n. 2 (N.D.Ind. 1995)(victim called a homosexual where there was no evidence or even allegation that the harasser believed the victim to be gay); *Morrison v. Dalton*, 1994 WL 727943 *1 (E.E.O.C. Dec. No. 01940137)(July 14, 1994)(male plaintiff asked, "Hey faggot, where's your boyfriend?"): *Diiorio v. Perry*, 1994 WL 741630 *1 (E.E.O.C. Dec. No 01941379)(November 22. 1994)(male plaintiff told that he "didn't have much muscle for a man"). These cases make clear how anti-gay sentiment can often be a form of, or at least a close relation to, sex stereotyping.

"because of sex."[13]

Central to the Seventh Circuit's decision in *Doe*, and key to the resolution of cases such as Mr. Oncale's, is an appreciation of the connection between sexual harassment and gender stereotypes. That Title VII addresses gender stereotypes was made most clear in *Price Waterhouse, Inc. v. Hopkins*, 490 U.S. 228 (1989). There, the defendant accounting firm denied partnership to the plaintiff, Ann Hopkins, because she was "macho" and used profanity and because her superiors thought that she should take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. This Court held that Title VII prohibits discrimination against women who are not sufficiently feminine, stating that "an employer who acts on the basis of a

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[13] In the opinion of *amici*, the Seventh Circuit's reasoning in *Doe* correctly applies traditional sexual harassment doctrine to a case of same-sex sexual harassment in contrast to other cases where male plaintiffs lost their Title VII claims based upon sets of facts similar to those in *Doe*. *See Goluszek v. H.P. Smith*, 697 F.Supp. 1452 (N.D. Ill. 1988)(male harassed by other males because he blushed easily and was abnormally sensitive to comments pertaining to sex); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135 (S.D. Tex. 1993)(male plaintiff sexually harassed by other male coworkers because he would not engage in their dirty conversations and because he had disapproved and complained of his co-workers' use of profanity at work); *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996)(sexually inexperienced developmentally disabled man sexually harassed by male co-workers).

belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250.

Price Waterhouse represented an important advance in Title VII law, one that provided the undergirding for the Seventh Circuit's decision in *Doe*. "[T]he fact that H. Doe was singled out for this abuse because [of] the way in which he projected the sexual aspect of his personality," rendered the complained of conduct discrimination "because of sex." *Doe v. City of Belleville*, 119 F.3d 563, 580. *Price Waterhouse* instructed that employment decisions made on the basis of *gender role identity* are discrimination "because of one's sex." The Fifth Circuit ignored this principle in *Oncale*.

B. The Fifth Circuit Erred In Requiring A Showing of Class-Based Treatment to Establish Discriminatory Intent

The circuit court below relied heavily upon an unpublished Fifth Circuit opinion in which the court dismissed a male plaintiff's allegations that he had been sexually harassed by another man. *Oncale*, 83 F.3d at 119-120, *citing*, *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir. 1993)(per curium)(unpublished), *cert. denied*, 513 U.S. 925 (1994). The court summarized the *Giddens* holding as, "male on male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex." *Id.* at 120. The court then went on to cite the only other same-sex sexual harassment opinion from the Fifth Circuit, *Garcia v. Elf Atochem No.Am.*, 28 F.3d 446 (5th Cir. 1994), for the proposition that "Title VII addresses

gender discrimination ... Thus, what Locke [the male defendant] did to Garcia [the male plaintiff] could not in any event constitute sexual harassment within the purview of Title VII." *Id.* at 120 (internal quotation marks omitted).

However, the court's conclusion - that male-on-male sexual harassment could never constitute a form of sex discrimination - does not follow, ineluctably or otherwise, from the two premises upon which the court relied: i) that "because of sex" is an element of the sexual harassment plaintiff's prima facie case, and ii) that Title VII prohibits gender discrimination.

To demand, as did the Fifth Circuit below, that the sexual harassment plaintiff show that he or she was treated "differently because of his [or her] sex," *Oncale*, 83 F.3d at 120, is to conceive of sexual harassment solely as a form of disparate treatment. While proof of disparate treatment is sufficient to make out a sexual harassment claim under Title VII, it is not necessary. For example, in *Robinson v. Jacksonville Shipyards*, the evidence demonstrated, among other things, that the women workers as a group were sexually harassed precisely because they were women - they were unwelcome female workers in the previously all-male shipyard. *Robinson*, 760 F.Supp. at 1498. Similarly, in *Hall v. Gus Const.Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988), women who worked on a road construction crew were targeted for harassment of both a sexual and non-sexual nature because they were women. *Id.* at 1014. In cases of this kind - frequently cases in which women have obtained jobs traditionally held by men - the easiest way for the female plaintiffs to make out their prima facie case is to show that women as a class were treated differently than men. The fact that the harassing conduct was sexual in nature may make

the harm particularly painful for the female victims, but proof of its sexual nature is not a necessary element of the plaintiffs burden of showing that the conduct was undertaken because of sex: women and men were treated differently, whatever the content of the offensive conduct.

While class-based proof of the disparate treatment of workers on the basis of sex may be sufficient to make out the plaintiff's case, it is not necessary that the plaintiff show that all or many members of his or her class were so treated. Surely Title VII does not require that either male or female sexual harassment plaintiffs establish themselves as fungible representatives of their "sexual group" in order to make out a claim of sex discrimination. Yet the Fifth Circuit opinion in *Oncale* cites approvingly *Goluszek v. H.P. Smith*, 697 F.Supp. 1452 (N.D.Ill. 1988),[14] in which the court required that the sexual harassment plaintiff show that he worked in an antimale environment." *Id.* at 1456. As Professor Kathryn Abrams observed in her analysis of the *Goluszek* case, the antimale environment rule requires a showing that

> the behavior challenged must operate, in some respect, against all members of the protected group. ... [I]n other words, it could have happened to any man, but not to any woman. In *Goluszek*, the court took this categorical logic one step further: it must be treatment that not only could have happened to any man but tends to reflect negatively on men as a group or create an environment hostile to men.

Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH.L.REV. 2479, 2514 (1994). Such a standard imposes an inappropriately heavy burden on plaintiffs while encouraging defendants to produce other members of the plaintiff's sex who could testify to the fact that they, as a woman, or as a man--that is, in their capacity as class representatives--did not regard the conduct complained of as offensive.

In *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996), for instance, a male employee objected to a common workplace antic called "bagging." "Bagging" is a practice whereby a person is grabbed from behind and picked up off the ground while another person squeezes the victim's testicles. *Quick v. Donaldson Co.*, 895 F.Supp.1288, 1292 (S.D.Iowa 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996)("Quick alleges that at least twelve different male co-workers bagged him on some 100 occasions.") When Quick complained about this behavior, his employer "told him that the next time somebody bagged him 'to turn around and bag the shit out of them.'" *Quick*, 90 F.3d at 1375.

In *Quick*, the Eighth Circuit found that a same-sex sexual harassment plaintiff could survive a summary judgment motion if there were some evidence that male employees, but not female employees, were bagged in this workplace. In that case, "a fact-finder could reasonably conclude that the treatment of men ... was worse than the treatment of women." *Id.* at 1379. This is, of course, a demand for proof of the disparate treatment of men and

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[14]"The Seventh Circuit in *Doe v. City of Belleville*, all but overruled the *Goluszek* decision: [w]e therefore reject the narrow construction of Title VII advanced in Goluszek..." 119 F.3d 563, 574.

women. But such a demand would be impossible to meet in an all-male workplace such as that in which Oncale worked, and in which many same-sex harassment claims arise. Again, while traditional disparate treatment evidence would be sufficient to prove that the offending conduct was undertaken because of sex, it is not necessary.

The antimale or antifemale requirement also raises problems of ripeness, as the court in *Tanner v. Prima Donna Resorts, Inc.*, 919 F.Supp. 351 (D. Nev. 1996), correctly observed:

> Title VII creates an individual claim which is ripe before the work environment has been poisoned for all workers of one sex or the other. It does not require that the work environment be hostile to all workers of the plaintiff's sex; it requires that the environment be hostile to the plaintiff.

Id. at 354 (citations omitted). Thus, the because of sex element of the sexual harassment plaintiff's case *can* be met by showing that women and only women, or men and only men, were singled out for sexually harassing treatment, but it need not be.

Relatedly, the fact that the harasser and the victim are of different sexes may reinforce a plaintiff's claim of discrimination, but it is not necessary to the claim. In *Price Waterhouse* the Court recognized that Ann Hopkins was denied partnership because she was insufficiently feminine to conform to the accepted gender stereotypes at her firm, not because the partners making the

decision were all men. Yet, according to the Fifth Circuit rule, if some or all of the partners at Price Waterhouse had been women who disapproved of Hopkins' gender identity, and for that reason they denied her partnership, that adverse job action "could not in any event constitute sexual [discrimination] within the purview of Title VII." *Oncale*, 83 F.3d at 120, *quoting, Garcia*, 28 F.3d at 452. The fact that it might have been women and men together, or women exclusively who enforced a gender stereotype in *Price Waterhouse*, should not render their conduct inoffensive to Title VII. Just as courts have recognized that federal anti-discrimination laws prohibit *intra-racial* discrimination on the basis of race, *see e.g. Walker v. Secretary of Treasury, I.R.S.*, 713 F.Supp. 403 (N.D.Ga. 1989)(Title VII); *Hansborough v. City of Elkhart Parks and Rec. Dept.*, 802 F.Supp. 199 (N.D.Ind. 1992)(Title VII); *Rodriguez v. Gattuso*, 795 F.Supp. 860 (N.D. Ill. 1992)(Fair Housing Act); *Franceschi v. Hyatt Corp.*, 782 F.Supp. 712 (D.Pr.1992)(§1981), so too should Title VII be interpreted to prohibit *intra-sexual* discrimination on the basis of sex. Nothing within either the text or history of Title VII requires that the perpetrator and the victim of sex-based discrimination be of different sexes.

III. UNWELCOME SEXUAL CONDUCT DIRECTED TOWARD A MEMBER OF THE SAME SEX MAY CONSTITUTE SEX DISCRIMINATION EVEN IN THE ABSENCE OF A SHOWING OF DISPARATE TREATMENT

In traditional harassment cases where the plaintiff alleges hostile conduct of a sexual nature, most courts, including this

Court in *Meritor*, are willing to infer,[15] if not conclude,[16] that the conduct was based upon sex without demanding any specific proof thereof beyond the sexual nature of the conduct. In the traditional sexual harassment scenario, where a man has engaged in unwelcome and offensive sexual conduct toward a woman in the workplace, proof of conduct that is consistent with the description of sexual harassment

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[15] *See, e.g, Smolsky v. Consolidated Rail Co.*, 780 F. Supp. 283, 295 (E.D. Pa. 1991) (comments such as "[I] would like to 'get into her pants' . . . . create the inference that the harassment and discrimination where intentional and based on the fact that the plaintiff was a woman"); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) ("[S]exual behavior directed at women will raise *the inference* that the harassment is based on their sex.") (emphasis added) *(citing Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904-05 (11th Cir. 1988)).

[16] *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) ("The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language *is implicit, and thus should be recognized as a matter of course.* A more fact intensive analysis will be necessary where the actions are not sexual by their very nature.") (emphasis added); *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988) (finding offensive and sexual nature of cartoons sufficient to establish that harassment was based on sex); *Konstantopoulos v. Westvaco Corp.*, 893 F. Supp. 1263, 1277 (D. Del. 1994). *aff'd*, 112 F.3d 710 (3d Cir. 1997)("Because at least some of the conduct at issue was sexually explicit, it is fair to draw the conclusion that, by virtue of this conduct plaintiff suffered intentional discrimination because of her sex.").

in the EEOC Guidelines[17] will typically establish a prima facie case. Proof of the "because of sex" element is generally not required: "once the plaintiff in such a case proves that harassment took place, the most difficult legal question typically will concern the responsibility of the employer for that harassment." *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983).

Thus, on *Meritor's and Robinson's* facts, where a man is charged with sexually harassing a woman, and the conduct is severe or pervasive, unwelcome, and hostile to a reasonable person, courts often regard the conduct as a kind of *per se* violation of Title VII. It is both reasonable and efficient to draw this inference in the typical sexual harassment case where a man subjects a woman to offensive sexual comments, come-ons, or physical abuse because sexist stereotyping is what the unwelcome sexual conduct *means* under these circumstances. *See Doe v. City of Belleville, Illinois*, 119 F.3d 563, 575-76 (7th Cir. 1997).

But what of same-sex harassment? Can the same inferences be drawn when a man is the victim of offensive and unwelcome sexual conduct, such as that alleged by Mr. Oncale? Not as easily, yet the recognition that such sexual conduct is not <u>always</u> discriminatory does not support the Fifth Circuit's conclusion that it can <u>never</u> be discriminatory. In effect, the Fifth Circuit's

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[17] The EEOC guidelines provide that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when ... such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1981).

reasoning in *Oncale* signals a return to the draconian treatment female sexual harassment plaintiffs received in the 1970s. *See Corne v. Bausch and Lomb, Inc.*, 390 F. Supp. 161 (D.Ariz. 1975). The Fifth Circuit has misunderstood the connection between unwelcome conduct of a sexual nature and sex stereotyping, just as courts misunderstood the relationship between sexual harassment and the sex stereotyping of women two decades ago. Contemporary Title VII doctrine has advanced well beyond this narrow view of the harm of sexual harassment.

Given that the Fifth Circuit was clearly wrong to hold, as a matter of law, that a man can never discriminate against another man, the question remains: Could unwelcome and offensive conduct of a sexual nature between persons of the same sex be reasonably understood as discriminatory under Title VII? Clearly it can. Where a male employee, for instance, endures offensive and unwelcome sexual harassment from his male coworkers because he does not live up to a stereotypic norm of proper masculinity, that person has been discriminated against because of his sex just as surely as Ann Hopkins was for failing to live up to the Price Waterhouse partners' stereotype of femininity.

When unwelcome and offense conduct of a sexual nature is used as a means to humiliate, intimidate or harass a person because of his or her gender identity, whether between persons of different or the same sexes, prior Supreme Court precedent as well as the plain meaning of Title VII supports the proposition that this conduct was "undertaken because of sex."

Other evidence may also suffice to show that same-sex sexual harassment amounts to discrimination because of sex.

Consider, for instance, a workplace culture which is permeated by a kind of "locker room" mentality, in which men engage in sexual conduct toward each other, and no one particular man is singled out for more egregious treatment, as was H. Doe. If one man or men regards the behavior offensive and unwelcome, makes his objection to the conduct known, and he becomes the target of continuing offensive sexual conduct, then a fact-finder could reasonably conclude that the conduct was undertaken because of sex.

In *Quick v. Donaldson Co.*, for instance, the circuit court could have invited additional evidence as to whether Quick was selected for bagging or other offensive conduct precisely because he had made his objections to the practice known. Indeed, there is some evidence in the court's opinion that this might have been the case.[18]

Here, *amici* urge that the Court reverse the court of appeals' determination that Title VII bars all same-sex sexual harassment claims, and remand the case for further fact-finding with respect to the circumstances under which Mr. Oncale alleges he was sexually harassed in order to determine whether that harassment amounted to discrimination because of sex. A more extensive inquiry is appropriate where, as here, the inferences that can reasonably be drawn in traditional sexual harassment cases - to wit, that the conduct had the purpose or effect of perpetuating sex stereotyping - cannot be so easily inferred from the sexual nature

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[18] "It appears that after Quick objected to being bagged, the violence he suffered escalated to a point where he was punched in the neck. *Quick*, 895 F.Supp. 1288, 1292.

of the conduct. Among the evidence that the trial court may find probative on this point is whether Mr. Oncale was singled out for harassment because of his failure to live up to some standard of masculinity, or whether he suffered continued offensive sexual conduct because he objected to a hypermasculine environment in his all-male workplace.

CONCLUSION

The Court should find that the prohibitions against workplace sex discrimination contained in Title VII include a prohibition against same-sex sexual harassment when such conduct was undertaken because of sex.

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Dated: August 11, 1997

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(14)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH ONCALE
Petitioner,
v.
SUNDOWNER OFFSHORE SERVICES, INC.
JOHN LYONS; DANNY PIPPEN; AND BRANDON JOHNSON,
Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF BUSINESS & CHAMBERS OF COMMERCE IN SUPPORT OF RESPONDENT

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I.

STATEMENT OF INTEREST

The Texas Association of Business & Chambers of Commerce ("TABCC") is a non-profit corporation that represents employers throughout the State of Texas. It is the largest employer representative in the State of Texas, with a membership that includes more than 6,000 business and 10,000 individual members, and 300 chambers of commerce. TABCC is interested in the outcome in this case because the Petitioner is asking the Court to adopt a position that would have a grave and unfair effect on employers.

II.

SUMMARY OF THE ARGUMENT

To adopt the position of Petitioner would be to make employers subject to and hence potentially liable under a law about which they received no advanced notice. It would unfairly penalize employers who have relied upon the plain and clear meaning of Title VII since its enactment. It would also require employers to become judges of the sexual orientation and practices of their employees. Thus, both principles of fairness and public policy considerations militate against recognition of same sex-sexual harassment claims under Title VII.

III.

ARGUMENT

A. **Having notice of the various laws affecting employers and the reasonable interpretation of such laws is of fundamental importance to all employers**. In fact, fundamental principles of fairness mandate that employers be given prior notice of laws that affect them or subject them to potential liability. Indeed, as this Court recently stated in ruling that Section 102 of the Civil

Rights Act of 1991 does not apply to Title VII cases pending on appeal when the statute was enacted:

> ... Neither in *Bradley [v. Richmond*, 416 U.S. 711 (1974)] itself, nor in any case before or since in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment. [Citations and footnote omitted.]
>
> It will frequently be true, as petitioner and amici forcefully argue here, that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity. ...
>
> The presumption against statutory retroactivity is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation.

Landgraf v. USI Film Products, 114 S.Ct.1483, 1507-08 (1994).

While it is recognized that the *Landgraf* decision applies specifically and expressly to the retroactivity of statutes, it is nonetheless instructive, if not directly applicable in this case. Judicial recognition of same-sex sexual harassment claims as covered by Title VII would be tantamount to passage of a new statute imposing additional potential liability on employers. Congress clearly did not intend to provide protection to employees based on their sexual orientation when it passed Title VII in 1964. *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69 (8th Cir. 1989)("Title VII does not prohibit discrimination against homosexuals."); *Ulane v. eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984)(transsexuals are not

protected under Title VII), *cert. denied*, 471 U.S. 1017 (1985); *DeSantis v. Pacific Tel. And Tel.*, 608 F.2d 327 (9th Cir. 1979)(homosexuals are not protected under Title VII); *Dillon v. Frank*, 58 F.E.P. Cases 90 (E.D. Mich. 1990), *aff'd*, 952 f.2d 4031 (6th Cir. 1992)(taunts and threats to the plaintiff which are based on the belief that the plaintiff is homosexual are not actionable under Title VII); *Polly v. Houston Lighting and Power*, 825 F.Supp. 135, 137 (S.D. Tex. 1993)("It is well established, absent any change in the law by Congress, that Title VII does not protect homosexuals from harassment and discrimination in the workplace, since such treatment arises from their affectional preference rather than from their sex."); *Sarff v. Continental Express*, 824 F.Supp. 1076, 1081 (S.D. Tex. 1995)("an employer can clearly fire an employee for being gay"). In fact, efforts to provide federal statutory anti-discrimination protection based on sexual orientation have been rejected by Congress on numerous occasions, as recently as 1996. *Romer v. Evans*, 116 S.Ct. 1620, 1637 (1996) (Scalia, J., dissenting).

Moreover, as the Court in *Landgraf* noted, "fairness concerns" are present in any case where damages may be assessed based on events that occurred prior to a law's enactment. 114 S.Ct. at 1560, n.35. The *Landgraf* Court stated: "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Id.*

Subjecting Respondent, and indeed any employer, to liability for alleged same-sex sexual harassment would violate fundamental principles of fairness and notice. Based on long-standing and well-established law, particulary in the Fifth Circuit where Respondent operates and from which this case originates, employers had no reason to suspect that they could be held liable for such alleged conduct under Title VII. To subject employers to such liability without notice would be unjust.

B. **Public policy considerations also support this Court's refusal to recognize same-sex sexual harassment claims under Title VII**. As the Court of Appeals for the Fourth Circuit recently noted in *McWilliams v. Fairfax County Bd. Of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert denied,* 117 S.Ct. 72 (1996) when refusing to expand Title VII to reach same-sex sexual harassment cases, such an extension of Title VII would result in litigants (both employees and employers) and the courts attempting to determine a person's sexual orientation. In *McWilliams*, the Fourth Circuit stated the following:

> We believe that were Title VII to be so interpreted [to reach claims "where homosexuality (either in fact or as merely suggested by conduct) is involved"], the fact of homosexuality (to include bisexuality) should be considered an essential element of the claim, to be alleged and proved. The dissent expresses concern, because of proof (and privacy?) problems, about requiring such allegation and proof, but we believe it critical and eminently fair to require it if homosexuality is to be the critical fact making same-sex harassment claims cognizable under Title VII. The (ordinarily different) sexes of the relevant actors always has been an essential element of either form of Title VII sexual harassment claims. If such claims were to reach past different-sex to same-sex situations where homosexuality of one or the other or both of the actors is involved, that added fact would seem equally essential to the statement and proof of such a claim. If not required to be alleged, a defendant could be blindsided by proof of conduct merely suggestive of homosexuality between persons of the same sex who actually are heterosexuals. If not required to be proved, the sexual harassment claim would effectively have been extended to cover any conduct between even same-sex heterosexual workers that included sufficient homosexual innuendo.

Id. at 72 F.3d 1191, n.5. Indeed, even the dissent in *McWilliams* acknowledged the problems which would result from recognizing same sex sexual harassment claims by noting that "evidence of sexual orientation could be relevant to either side's case." *Id.* at 1198.

Moreover, by recognizing same-sex sexual harassment claims, courts may ultimately be encouraging all alleged harassers to claim that they are bi-sexual. Because the plain language of Title VII requires a plaintiff to establish that "but for" his or her sex (i.e., gender), the alleged harassment would not have occurred, courts as far back as 1977 have found that where an alleged harasser is bi-sexual, the harasser's sexual advances do not constitute discrimination under Title VII. *See Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977). The *Barnes* court reasoned that the but-for test could not be satisfied where the alleged harasser is bi-sexual because the harassment would have occurred regardless of the "victim's" gender. *Id.* The reasoning of the *Barnes* court was also noted with approval in *Bundy v. Jackson*, 641 F. 2d 934, 942 n. 7 (D.C. Cir. 1977)("Only by a *reductio ad absurdum* could we imagine a case of harassment that is not sex discrimination -- where a bisexual supervisor harasses men and women alike.") and *Henson v. City of Dundee*, 682 F. 2d 897, 904 (11th Cir 1982)(In the case of a bisexual harasser, "the sexual harassment would not be based upon sex because men and women are accorded like treatment. Although the plaintiff might have a remedy under state law in such a situation, the plaintiff would have no remedy under Title VII."). Indeed, even courts that have allowed plaintiffs to proceed under Title VII based on claims of homosexual sexual harassment have recognized that they would not have done so if the alleged harasser was bisexual. *See. e.g., EEOC v. Walden Books*, 885 F.Supp. 1100, 1103-04 (M.D. Tenn. 1995)("When a homosexual supervisor is making offensive sexual advances to a subordinate of the same sex, **and not doing so to employees of the opposite sex**, it absolutely is a situation where but for the subordinates sex, he would not be subjected to that treatment."); *Wright v. Youth Methodist*

Service, 511 F.Supp. 307 (N.D. Ill. 1981)(applying the but for test and concluding that terminating an employee for refusing homosexual advances violated Title VII because it involved "an alleged demand of a male employee **that would not be directed to a female**); *Parrish v. Washington Nat'l Ins. Co.*, No. 89.C.4515, 1990 WL 16561 1, *7 (N.D. Ill. Oct. 16, 1990)(same).

These proof and privacy problems are inherent in any judicial expansion of Title VII beyond the scope of its statutory language or legislative history to permit same-sex sexual harassment claims. Unless and until new, affirmative legislative action mandates otherwise, the courts should refrain from expanding Title VII to permit such claims. Indeed, to do otherwise would unfairly subject employers to liability of which they reasonably could not have been aware, and mandate that employers and the courts attempt to judge and determine a litigant's sexual orientation and/or practices. Employers have a difficult enough time discerning whether conduct is prohibited under Title VII based on the primarily objective factors contained in the statute (i.e., race, color, national origin). To mandate that employer's must now determine a person's sexual orientation in order to comply with the law would be unduly burdensome and far beyond the intent of Congress in 1964.

IV.

CONCLUSION

Petitioner's request that this Court find same-sex sexual harassment claims actionable and/or cognizable under Title VII of the Civil Rights Act of 1964, as amended, should be denied. The decision of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 96-568

JOSEPH ONCALE, PETITIONER

v.

SUNDOWNER OFFSHORE SERVICES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT
AND FOR DIVIDED ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States and the Equal Employment Opportunity Commission (EEOC) as amici curiae, respectfully moves that oral argument on behalf of petitioner be divided, and that the government be allowed 10 minutes of argument time. The government filed a brief supporting petitioner.

1. This case arises out of an action brought by petitioner under Title VII of the Civil Rights Act of 1964, 42 U.S.C. et seq., which prohibits discrimination in employment because of an individual's sex. Petitioner filed the suit against respondents, his former employer Sundowner Offshore Services, Inc., as well as his former supervisor, and two co-workers, all of whom are male,

as is petitioner. Petitioner alleged that respondents had subjected him to sexual discrimination and harassment in employment practices, and consequently forced him to resign, in violation of Title VII. He alleged that he had been subjected to both a discriminatorily hostile work environment and to quid pro quo harassment because of his sex.

The court of appeals summarily affirmed the district court's entry of summary judgment for respondents, in light of binding circuit precedent that "bar[red] all same-sex sexual harassment claims" under Title VII. Pet. App. 5-6. In the view of the courts below, no claim of sexual-harassment sex discrimination in violation of Title VII that is brought by a person against alleged harassers of the same sex is covered by Title VII. The court of appeals' ruling thereby substantially affects the statutory scheme fashioned by Congress to govern claims of employment discrimination because of sex.

2. The United States and the EEOC have a strong interest in the resolution of the question presented. The EEOC was established by Congress to interpret and enforce Title VII. It has an interest in the effectiveness of the entire congressional plan for eradicating discrimination because of sex, including questions that arise under Title VII in private actions brought by employees. Such private suits serve an important role in accomplishing the purposes of Title VII. Cf. McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 358 (1995). In response to the Court's invitation, the Acting Solicitor General

filed a brief on behalf of the EEOC and the United States as amicus curiae at the petition stage of this case.

The EEOC has long recognized that harassment on the basis of sex is a violation of Title VII. In 1981, the EEOC issued an opinion reaffirming its "long standing position * * * that Title VII does not cover discrimination which occurs because of an individual's sexual preference," but it recognized that claims of same-sex harassment could be shown to be because of an individual's sex. EEOC Dec. No. 81-16 (Jan. 1981), reprinted in EEOC Dec. (CCH Employment Practices Guide) ¶ 6756, at 4796 (1983 ed.); see also 2 EEOC Comp. Man. § 615.2(b)(3) (Oct. 1981).

Title VII's prohibition against discrimination because of sex extends to federal agencies. 42 U.S.C. 2000e-16. Thus, the United States, as an employer, is bound by the Court's interpretation of the scope of Title VII and has an interest in ensuring that Title VII is correctly interpreted to serve its intended purposes.

For the foregoing reasons, we believe that oral presentation of the government's views would be of material assistance to the Court. The Solicitor General has participated in the oral argument in this Court in a number of recent cases involving the interpretation of Title VII, including Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997); Walters v. Metropolitan Educational Enterprises, Inc., 117 S. Ct. 660 (1997), and the Court's last sexual harassment case under Title VII, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993). Although we have attempted on a number

of occasions to contact counsel for petitioner, counsel has not informed us whether he would agree to cede argument time to the government.

Respectfully submitted.

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Acting Solicitor General

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